No. 1

Supreme Court, U.S.
FILED
041280 MAR 14 2005

In The Supreme Court of the United States

LAKESIDE EQUIPMENT CORPORATION,
A DELAWARE CORPORATION,

Petitioner,

v.

THE TOWN OF CHESTER,
A VERMONT MUNICIPAL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VERMONT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Does the refusal of the courts of the State of Vermont to enforce the valid and final judgment of an Illinois court against a Vermont municipality, accomplished by ignoring the municipality's waiver of personal jurisdiction and permitting a belated collateral attack on that judgment on grounds arising nominally under state agency law, offend the Full Faith and Credit clause of the United States Constitution and 28 U.S.C. § 1738?

PARTIES TO THIS PROCEEDING

All parties to this proceeding are set forth in the caption.

CORPORATE DISCLOSURE STATEMENT WITH RESPECT TO THE PETITIONER

The Petitioner, Lakeside Equipment Corporation, is a Delaware corporation that has no parent corporation. No publicly-held company holds 10% or more of the Petitioner's stock.

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Lakeside Equipment Corporation, a Delaware corporation ("Lakeside"), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Vermont entered in the above-titled proceedings on August 19, 2004.

OPINIONS BELOW

1. The Entry Order of the Vermont Supreme Court dated August 19, 2004, is reported at 2004 Vt. 84, 865 A.2d 422 (2004), and reproduced at App. 1-9, *infra*.

2. The Findings, Opinion and Order of the Windsor County Superior Court dated April 1, 2003, are unreported and reproduced at App. 10-20, *infra*.

3. The Opinion of the Vermont Supreme Court dated February 15, 2002, is reported at 173 Vt. 317, 795 A.2d 1174 (2002), and reproduced at App. 21-23, *infra*; the Entry Order associated with this opinion is set out at App. 34-35.

4. The Decision *Re* Plaintiff's Motion for Summary Judgment (No. 3) of the Windsor County Superior Court, dated November 3, 2000, is unreported and is reproduced at App. 36-58, *infra*.

JURISDICTION

The judgment of the Vermont Supreme Court was entered on August 19, 2004. A petition for rehearing (styled a Motion for Reargument under Vermont procedure) was filed on October 1, 2004, and denied on December 16, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case entails the refusal by a state court of last report to apply the Full Faith and Credit Clause of the United States Constitution and the statute implementing that Clause, 28 U.S.C. § 1738. They provide, in relevant part:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const. art. IV, § 1.

> Such Acts, records and judicial proceedings, or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738, para. 3 (enacted in original form by Act of May 26, 1790, ch. 11, 1 Stat. 122).

STATEMENT OF THE CASE

As 1994 dawned over the Green Mountains, the tiny Town of Chester, Vermont (the "Town") faced daunting challenges regarding its failing sewage treatment plant. Aged beyond its useful life, battered by harsh New England winters and unable even to handle large rains, the plant regularly failed to meet the requirements of the Town's Clean Water Act discharge permit, dumping excessive

amounts of pollutants into the Williams River and subjecting the Town to fines and threats of further enforcement actions from Vermont's State Agency for Natural Resources ("VANR"). Confirming the obvious, an engineering consultant branded key components of the system "decrepit" and in need of a "major overhaul."

In the months preceding his retirement, the longtime Town Manager had begun to address the Town's sewage treatment needs, notably by hiring a new Chief Operator for the plant, David Duquette, who was experienced in coaxing maximum performance out of creaky systems, and charging him with planning for replacement and rehabilitation of the aging treatment works in order to get the Town back into environmental compliance. Duquette worked with an outside engineering firm preparing a "Twenty-Year Comprehensive Evaluation" required by VANR with respect to plants, like the Town's, that had reached the limits of their designed useful lives. As part of the planning process, Duquette made contact with manufacturers capable of fabricating replacement parts for the plant to obtain quotes; among them was an employee-owned business located in the greater Chicago, Illinois area, Lakeside Equipment Corporation ("Lakeside").

The Town's first contact with Lakeside came in early 1994, as Duquette and the Town's engineer sought quotes for replacing the aeration components of its system.[1] Lakeside, through a manufacturer's representative, quoted the job but lost it to a Massachusetts-based firm. A second

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[1] The Town's sewage treatment plant was typical of the those installed in the 1960's and early 1970's, providing for three stages of treatment: primary biodegradation accelerated by mechanical aeration of the influent flow; secondary treatment accomplished by use of large clarifying tanks in which mechanical components help to separate out solids; and tertiary disinfection of the liquid effluent resulting from the clarification process by chlorination, prior to discharge into surface waters.

round of contacts with Lakeside ensued in mid-1994 as the Town sought quotes for replacing the clarifier components of the system, a task made more urgent by VANR's insistence that the clarifier repairs were necessary to maintain compliance with the Town's discharge permit. In response to telephone inquiries to Lakeside's Illinois headquarters, initiated by Duquette, Lakeside sent a representative to Chester to review the Town plant's needs on July 1, 1994. Armed with its representative's field observations and measurements, Lakeside prepared a quote for fabricating two replacement clarifier assemblies, at slightly more than $23,000 each, submitted initially by telephone and later formally by letter dated August 7, 1995.

The efforts to update the aging plant were well known in Chester, both within the Town government and among the citizenry at large. Replacement of the aeration components and other capital investments consumed $104,827 in 1994, a sum rivaling the entire wastewater operational budget for the year and requiring substantial transfers from reserves known as the "sinking" or "servicing" fund. App. 85-86. The Town Selectmen described the sewage plant as "one of the most difficult projects facing the Board" in their 1994 Annual Report to the citizens, bemoaning the "unalterable time limits" imposed by the state, litigation with a Texas company that had failed to produce an acceptable remediation design, and the need "to hurry to get an acceptable system in place." App. 87. The new Town Manager, Susan Spaulding, devoted part of her commentary within the Town's 1995 Annual Report to its citizens to lauding the 1994 capital improvements and Mr. Duquette's plans to "begin upgrading the clarifiers this summer [*i.e.*, 1996]." App. 85.

Responding to continuing regulatory pressure, the Town Manager on February 16, 1996, committed in writing to VANR that the Town would replace one of the two

decrepit clarifiers in 1996, and the second one in 1997. App. 78. The Town also moved forward with plans to enclose the open-air clarifiers in a pole barn-type building, to be constructed by the Public Works Department, in order to protect the new assemblies from the elements. The Town's 1996 budget contained a specific appropriation of $9,100 for capital improvements; the Town Manager assured VANR that this amount, augmented by servicing fund balances of $21,000, would be "available" to fund these "necessary improvements." App. 78-79.

Replacing both clarifiers at once, rather than on a staggered schedule, became attractive for several reasons. In the first place, Duquette and the Public Works Director realized, in the course of planning the building that would enclose the clarifiers, that lifting and installing the large, heavy replacement assemblies would be difficult once the building was completed. Moreover, multiple conversations with Lakeside revealed that there were substantial diseconomies to staggering production, including duplicative setup and shipping costs; Lakeside strongly preferred to fabricate both new clarifier assemblies at once, and provided a revised quote of just over $40,000 for both, reflecting a substantial per-unit discount and shipping savings for doing the two together. At Duquette's request, Lakeside prepared shop drawings and specifications for the replacement assemblies.

Duquette would testify at trial, almost seven years later, that he regularly discussed these developments with Spaulding, the Town Manager, and received her unambiguous authorization to proceed with an order from Lakeside of the two clarifier assemblies; Spaulding would testify that she provided no explicit authorization. Duquette placed the order by telephone call to Lakeside's Illinois headquarters on April 15, 1996, and provided what he described as a Town purchase order number in a

subsequent telephone conversation. Lakeside entered the order, sent the Town a detailed acknowledgment letter dated April 23, 1996, App. 80-82, including drawings detailing the order, specially manufactured the parts over the next eight weeks, and shipped them from its Iowa fabrication facility on June 24, 1996.

Duquette found a flatbed truck containing the new assemblies awaiting him when arrived at work early on the morning of June 27, 1996. He accepted the shipment on behalf of the Town, executing standard shipping documents, and with the help of the town Public Works Director and his crew, unloaded the new clarifier assemblies at the plant. Duquette's employment with the Town was abruptly terminated for unrelated reasons a few days later.

Lakeside's invoice, mailed from Illinois at the time of shipment and payable in full 30 days after shipment, remained unpaid in late July, and on July 24, 1996, Lakeside's controller accordingly called the Town, speaking directly with the Town Manager. Spaulding promised that payment would be sent on July 31. Lakeside's next communication from the Town, however, took the form not of a check, but rather a late August letter from Spaulding, belatedly asserting that Duquette was not authorized to place the order, disclaiming any obligation to pay for the goods and offering to return them. Because the goods were specially manufactured for the Town's installation, they were worthless to Lakeside, and Lakeside refused to accept a return. The Town refused subsequent demands for payment in September and October, 1996.

Lakeside's written confirmation of the Town's order included the company's standard conditions of sale, by their own terms deemed accepted if not objected to in writing. App. 83. The conditions included a clause providing for mandatory arbitration of disputes relating to the sale under

the Commercial Arbitration Rules of the American Arbitration Association ("AAA")[2] and providing for jurisdiction and venue in the courts of Kane County, Illinois. App. 84. Lakeside demanded arbitration on November 26, 1996; the Town received actual notice of the proceeding and, later, in accordance with AAA procedures, an invoice for one-half of the estimated arbitrator's fee. The Town paid its share, $1,000, to AAA at its Chicago offices. App. 77.

The arbitrator set a hearing for June 24, 1997, in Chicago, at which he heard Lakeside's evidence; the Town did not send a representative to the hearing. By letter dated July 19, 1997, the arbitrator explicitly requested post-hearing briefing on the subject of the arbitration tribunal's jurisdiction to decide the matter. Lakeside provided a brief; the Town received the arbitrator's request, but did not respond. App. 76. The arbitrator ultimately determined that he had jurisdiction, and entered an award in the amount of the contract price, plus interest and costs. In early 1998, Lakeside, pursuant to the provisions of Illinois' version of the Uniform Arbitration Act and upon notice to the Town, moved in the Kane County, Illinois courts for, and obtained entry of, orders confirming the arbitrator's award and entering judgment upon that award. App. 69-77. The Town did not appeal or otherwise challenge the judgment.

When the Town failed to pay the judgment, Lakeside filed a Complaint to Domesticate and Enforce a Foreign Judgment in state court in Vermont, contending that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, as well as Vermont cases applying that constitutional guarantee, required recognition of the Illinois judgment. App. 67-68. The Town countered that full faith and credit did not attach

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[2] Relevant excerpts from the AAA rules, as they were in effect at the time of the Illinois arbitration, are set out *infra*, App. 93-95, and are cited as "AAA Comm. Arb. R. ___."

because the Illinois judgment was void, inasmuch as neither the arbitrator nor the Illinois court constitutionally could exercise personal jurisdiction over the Town. The Town contended that Duquette was not the authorized agent of the Town for purposes of entering into the contract, and that, separate and apart from Duquette, the Town (as distinct from Duquette) had insufficient contacts with Illinois to support the exercise of jurisdiction over it.

In a November 3, 2000, decision on Lakeside's summary judgment motion, the Windsor, Vermont Superior Court found for Lakeside. App. 36-58. The trial court held that Duquette clearly possessed at least "some actual authority" to purchase equipment from Lakeside (not least because of approved budget authority for that purpose), and that Duquette's course of dealing with Lakeside, together with Town Manager's post-delivery acknowledgment of the delivery and promise to pay, met the requirement for "purposeful" availment of the Illinois forum elaborated by this Court in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), thus providing the requisite minimum contacts for the exercise of jurisdiction. App. 53-57. Given that the exercise of personal jurisdiction was proper, the Superior Court determined that it "must give full faith and credit to the Illinois judgment," App. 58, and granted summary judgment on Lakeside's request to domesticate the Illinois judgment against the Town.

The Town appealed to the Supreme Court of Vermont, contending that Duquette had neither actual nor apparent authority to bind the Town and that Lakeside had a duty to confirm the scope of Duquette's authority. On February 15, 2002, the Vermont Court entered an order, 173 Vt. 317, 795 A.2d 1174 (2002), App. 34-35 (*Lakeside I*), acknowledging the presumption of full faith and credit attaching to sister-state judgments and the heavy burden faced by one seeking to undermine such a judgment, 173 Vt.

at 321, 795 A.2d at 1178, App. 25. The Court went on, however, to recite the Town's contention that Illinois did not possess jurisdiction, *id.*, and to identify the question whether Duquette's actions properly could be imputed to the Town as the "central issue of this case" for determining the dispositive jurisdictional issue. 173 Vt. at 324, 795 A.2d at 1180, App. 29. Finding the record insufficient on this point, the Court reversed and remanded to the trial court with instructions to entertain further evidence on the questions of Duquette's actual or apparent authority as the Town's agent, and whether the Town ratified the contract. 173 Vt. at 326, 795 A.2d at 1182, App. 33.

On remand, the case was tried before a different judge of the Superior Court who found for the Town, holding that Duquette did not possess actual authority to place the order and that the Town had not taken actions holding Duquette out as its agent sufficient to cloak Duquette with apparent authority to place the order. App. 17. The trial court also rejected Lakeside's assertion that the Town had ratified the contract, after the fact, through the actions of the Town Manager. App. 18. In the absence of actual or apparent authority on the part of Duquette or ratification, the trial court held, there was never a valid contract, there accordingly were insufficient contacts between the Town and Illinois to support Illinois' exercise of jurisdiction over the Town, and it would "decline[] to enforce the judgment from the State of Illinois, based on lack of personal jurisdiction." App. 19.

Lakeside appealed to the Vermont Supreme Court, challenging the trial court's determinations regarding actual and apparent authority and ratification, as well as that court's failure to address Lakeside's argument that the Town was estopped from refusing to pay for the clarifiers. The Supreme Court affirmed the trial court's decision in an order entered on August 19, 2004, 2004 Vt. 84, 865 A.2d 422,

App. 1-9 (*Lakeside II*), holding that full faith and credit did not attach to the Illinois judgment because Duquette was not the actual or apparent agent of the Town and apart from Duquette's dealings with Lakeside, the Town did not have sufficient contacts with Illinois to support Illinois' exercise of jurisdiction over it. 2004 Vt. at ___, 865 A.2d at 425-26, App. 5-7. Lakeside petitioned for rehearing,[3] asserting that the Court had ignored substantial evidence of both actual and apparent authority on the part of Duquette, as well as a course of dealing that established sufficient contacts to satisfy the exercise of jurisdiction separate and apart from the order at issue. The Vermont Supreme Court denied rehearing in an order entered December 16, 2004. App. 62-63. This petition ensued.

REASONS FOR GRANTING THE PETITION

This case raises a simple yet fundamental question that goes to the heart of the difference between a nation and a confederation of sovereign states: whether the courts of one state may ignore undisputed evidence of submission to the jurisdiction of a sister state rendering judgment, and refuse to apply well-established principles of agency law and estoppel, in order to evade the "exacting" constitutional requirement that a sister state's final and nonappealable judgment be granted full faith and credit. Although the dispute may appear mundane – failure to pay for $40,000 worth of sewage treatment equipment specially manufactured – the federal principle that the Vermont courts evaded is precious, embodying the essence of the nation forged when the Constitution replaced the Articles of Confederation. If circumventing the constitutional mandate of full faith and credit is as simple as the Vermont courts' decisions suggest, this elemental constitutional principle is

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[3] Under Vermont procedure, the motion to obtain rehearing is formally known as a "Motion for Reargument." Vt. R. App. Proc. 40.

at risk of being rendered little more than a hollow aspiration.

Unlike most of this Court's modern Full Faith and Credit cases, the present case does not entail some "gray area" in which full faith and credit principles collide with competing interests, such as a state's competence to legislate in an area of substantial state interest.[4] To the contrary, the present case squarely presents the transparent effort, on the part of a state court of last resort, to circumvent the core constitutional requirement of full faith and credit in precisely that circumstance in which this Court repeatedly has required its most "exacting" application, the crediting of a sister-state judgment.

A. The Town Accepted and Waived Objections to Personal Jurisdiction, and Affirmed the Existence of the Contract, Effecting Ratification, When it Submitted to the Arbitration Tribunal Sitting in Illinois.

The Vermont courts acknowledged as undisputed, but failed to give any legal effect to, the Town's waiver of objections to jurisdiction in Illinois and affirmance of the existence of the contract at issue when the Town acknowledged the authority of the Illinois arbitration tribunal by appearing in it.

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[4] *E.g., Franchise Tax Bd. v. Hyatt*, 538 U.S. 488 (2003).

The fact of the Town's payment of $1,000 in arbitration fees[5] to the American Arbitration Association ("AAA") tribunal, sitting in Illinois, is both well documented in the record and undisputed. App 23, 42, 77. As set forth in greater detail in the margin, pursuant to the AAA's Commercial Arbitration Rules, the fees paid by the Town, as respondent, are required, not at the outset of the case, but at an advanced stage of the proceeding; moreover, they are jurisdictional in the sense that the arbitration hearing, set at the time the fees are assessed, will not go forward if there is no payment.

While the Town unquestionably *could* have refused completely to acknowledge the Illinois arbitration, and reserved any challenge to jurisdiction to the time (if any) when enforcement of the Illinois judgment was sought in Vermont, *that is not what the Town did.* To the contrary, the Town sent a check, earmarked for payment of the arbitrator in this case, to pay for the Town's participation in the adjudication that the Illinois court later confirmed and

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[5] Pursuant to the AAA Commercial Arbitration Rules, the party seeking arbitration must file a demand, pay an initial filing fee, and serve the demand on the respondent. AAA Comm. Arb. R. 6. AAA provides notice of the filing to the respondent; the respondent *may* file an answering statement, but unlike a typical court action, if the respondent fails timely to respond, that failure is deemed a general *denial*, not a default. *Id.* The arbitrator sets the date, time and place of hearing, *id.* R. 21, and the parties are required to make an advance payment of the arbitrator's estimated fees and other expenses as a prerequisite for convening of the hearing, *id.* R. 51. Attendance at the hearing by a party is not mandatory; the arbitrator is specifically authorized to conduct the hearing "in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement." *Id.* R. 30. The AAA procedures do not permit a default judgment to be entered; the hearing *must* be conducted in order for the arbitrator to make an award. *Id.* sent. 2. As a part of the AAA arbitration process, the parties are deemed to have consented "that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." *Id.* R. 47.

reduced to judgment. The Town did not default; its payment ensured that it *could not* default, and secured a permanent place for the Town at the arbitration table. Appearance at the hearing convened after the Town's payment, and submission of evidence and argument, was by the terms of the tribunal's rules permissive,[6] once the Town had appeared.

1. The Town's Appearance in the Illinois Arbitration Tribunal Constituted an Acceptance of, and a Waiver of Objection to, Illinois' Exercise of Personal Jurisdiction Over the Town.

These undisputed facts have inescapable legal consequences that the Vermont courts failed to acknowledge. This Court has long recognized that an objection to *in personam* jurisdiction is the personal privilege of a defendant and "may be lost by failure to assert it seasonably, by formal submission in a cause, *or by submission through conduct.*" *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) (emphasis added). Submission through conduct has been held to encompass any number of steps short of filing a formal answer, or even physically appearing before a tribunal; as the Fifth Circuit has held, "'[a]n appearance may also arise by implication . . . by reason of [the defendant's taking] of *some act* or proceeding *recognizing the case as in court.*'" *Cactus Pipe & Supply v. M/V MONTMARTRE*, 756 F.2d 1103, 1108 (5th Cir. 1985) (emphasis added) (quoting 6 C.J.S. Appearances § 18, at 22 (1975)); *see also Broadcast Music, Inc. v. M.T.S. Ents., Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) (applying principle to find waiver). Nor must this recognition of the pending case be formal; as the First Circuit has held, construing "appearance" in Fed. R. Civ. P. 55(b)(2), even a telephone call among counsel, evidencing an intent to defend against

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[6] AAA Comm. Arb. R. 30.

the claim, is sufficient, for an appearance is construed broadly

> "to include a variety of *informal* acts on defendant's part which are responsive to plaintiff's formal action in court, and which may be regarded as sufficient to give plaintiff a clear indication of defendant's intention to contest the claim."

Sun Bank v. Pelican Homestead and Savings Ass'n, 874 F.2d 274, 276 (1st Cir. 1989) (emphasis added) (quoting 6 James Wm. Moore, Moore's Federal Practice, ¶ 55.05[3], at 55-57 (2d ed. 1988); *see also Marcial Ucin, S.A. v. SS GALICIA*, 723 F.2d 994, 997 (1st Cir. 1983) (attendance at depositions by party who had not filed responsive pleading sufficient to constitute appearance).

The Town's submission through conduct to the jurisdiction of the arbitration tribunal, sitting in Illinois, thus constituted an acceptance of, and a waiver of objections to, Illinois' jurisdiction in this case. As the Fifth Circuit observed in ruling against defendants seeking to set aside a default judgment on the theory that their participation in a case, short of answering, could not constitute an appearance, a defendant may not "halfway appear" in a case, then belatedly "pull" a jurisdictional defense "out of the hat like a rabbit in order escape default judgment." *Broadcast Music, supra*, 811 F.2d at 281. Yet that is precisely what the Town did, and was permitted to do by the Vermont courts.

2. Pursuant to Well Established Principles of Agency Law, the Town's Submission to the Illinois Arbitration Tribunal Also Constituted an Affirmance of the Contract that Provided for the Jurisdiction of that Tribunal.

The decisions of the trial and appellate courts in the second round of proceedings below focused almost exclusively upon the existence of an actual or imputed agency relationship between the Town and David Duquette. Largely lost in this single-minded treatment was Lakeside's independent argument that, regardless whether Duquette was exercising actual or apparent authority when he ordered the clarifier assemblies from Lakeside for the Town's sewage treatment plant, the Town had ratified the contract through its subsequent actions, and thus consented to Illinois' jurisdiction in accordance with the terms of the arbitration and jurisdictional choice provisions of the written agreement.

Both Illinois[7] and Vermont[8] embrace the general principles of the Restatement (Second) of Agency (the "Restatement (Second)") in their decisional law.[9] As the Restatement makes clear, even when the principal is not

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[7] *See, e.g., Guaranty Bank & Trust Co. v. Renya*, 51 Ill. App. 2d 412, 201 N.E. 2d 144, 151 (1964) (applying Restatement (Second) to find affirmance); *see also Athanas v. City of Lake Forest*, 276 Ill. App. 3d 48, 57, 657 N.E.2d 1031, 1038 (Ill. Ct. App. 1995) (applying Restatement (Second) § 97 to find assertion of defense as affirmance).

[8] *See, e.g., Estate of Sawyer v. Crowell*, 151 Vt. 287, 291, 559 A.2d 687, 691 (1989) (citing *Couture v. Lowery*, 122 Vt. 239, 245, 168 A.2d 295, 299 (1961) ("subsequent ratification is equivalent to prior authority," citing); Restatement (Second) of Agency § 82).

[9] Restatement (Second) of Agency (1958) [hereinafter cited as "Restatement (Second)"].

bound by the act[10] of its agent or putative agent by application of the ordinary rules of authority (actual, implied or apparent), the principal nevertheless may become bound by ratifying the act: "[r]atification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account," thereby binding the principal to the transaction as if the agent had originally been actually authorized. Restatement (Second) § 82.

An "affirmance" by the principal, in turn, may take one of two general forms:

> **§ 83. Affirmance**
>
> Affirmance is either:
>
> (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
>
> (b) conduct by him justifiable only if there were such an election.

Restatement (Second) § 83.

Affirmance may be manifested not only by a positive declaration, but more broadly "by *any* conduct of the purported principal manifesting that he consents to be a party to the transaction, or by *conduct justifiable only if there is ratification*," *id.* § 93 (emphasis added). Long before even

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[10] This discussion is framed, for brevity's sake, in terms of the "act" of the agent or putative agent. It is of course well-established that not only acts, but mere words or even silence can serve to bind the principal. *See, e.g.*, Restatement (Second) §§ 43 (acquiescence by principal in agent's prior conduct sufficient to prove authorization or ratification), 92(g) (affirmance can be imputed even if principal does not communicate with anyone), 94 (failure to act as affirmance).

the Restatement (First) of Agency had appeared, this Court had held that "one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act." *Robb v. Vos*, 155 U.S. 13, 43 (1894). The Restatement (Second) extended the logic of *Robb* to defenses; among the forms of conduct it deems an affirmance is the assertion, in an action in which the third party who relied upon the agent's act is adverse, of a "defense upon the unauthorized transaction as though it were authorized," Restatement (Second) § 97(b),[11] a principle applied by federal[12] and state[13] courts alike to find ratification of the underlying transaction.

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[11] The full text of this section is as follows:

> **§ 97. Bringing Suit or Basing Defense as Affirmance.**
>
> There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third party or the purported agent is an adverse party:
>
> (a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized;
> (b) bases a defense upon the unauthorized transaction as though it were authorized; or
> (c) continues to maintain such suit or base such defense.

Restatement (Second) § 97, at 250.

[12] *See, e.g., IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp.*, 26 F.3d 370, 375 (2d Cir. 1994) (*Robb* principle "applies with equal force where the affirmative allegations are made by the defendant").

[13] *See, e.g., Athanas, supra*, 276 Ill. App. 3d at 57, 657 N.E.2d at 1038 (defense of action on contract ratifies that contract). The Vermont Supreme Court cited *Athanas* in its first decision in this case, *Lakeside I*, 173 Vt. at 326, 795 A.2d at 1181, App. 18, but attempted to distinguish it by suggesting that the Town Manager did not have full knowledge of the facts when she acknowledged the clarifier order and promised payment. Such an argument, however, cannot dismiss the effect of the Town's later ratification by submitting to the jurisdiction of the arbitration tribunal.

The Town's acknowledgment of the pendency of, and its affirmative steps to secure its participation in, the adjudication conducted by an Illinois arbitration tribunal constitute an act that cannot be justified as anything other than an affirmance of the contract containing a binding arbitration clause prescribing the Illinois forum; indeed, otherwise the town's acts would be wholly nonsensical. If these acts are an affirmance, the contract is ratified; and if the existence of an Illinois contractual obligation is ratified, there unquestionably was personal jurisdiction over the Town pursuant to the Illinois long-arm statute's provisions extending jurisdiction to those who "make" any contract "substantially connected" with Illinois.[14]

B. The Vermont Court Failed to Apply Well-Established Principles of Agency Law, Thereby Erroneously Permitting the Town to Evade Responsibility for the Acts of its Apparent Agent upon whom Lakeside Had Relied in Good Faith.

In its initial disposition of this matter on summary judgment, the trial court, applying well-trod principles of the common law of principal and agent, found that David Duquette had indeed been the agent of the Town, possessing at least "some actual authority." App. 56-57. In *Lakeside I*, the Vermont Supreme Court took issue with the sufficiency of the evidence below to support that conclusion, remanding for development of a further record on the issues of actual and apparent authority. 175 Vt. at 326, 795 A.2d at 1182, App. 33. On remand, the trial court heard evidence

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[14] Illinois' long-arm statute provides for jurisdiction over a nonresident who, "in person or *through an agent* . . . make[s] or perform[s] . . . any contract or promise substantially connected with [Illinois]," 735 Ill. Comp. Stat. 5/2-209(a)(7) (emphasis added), and explicitly permits the exercise of jurisdiction "on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States," *id.* 5/2-209(c).

and came to the opposite conclusion, holding that "Lakeside has not shown actual or apparent authority." App. 19. On appeal, the Vermont Supreme Court affirmed the second trial court's holding on this point. *Lakeside II*, 2004 Vt. at ___, 865 A.2d at 424-26, App. 3-6.

These latter two decisions, however, applied and affirmed, respectively, a sharply constricted view of the law of agency generally, and the law of apparent agency in particular, to reach the conclusion that would support insulation of the Town from liability. This sharply constrained view of the common law was not an artifact of *bona fide* state law differences, and flew in the face of prior Vermont and Illinois decisions on point; on the facts of this case, it is impossible to understand the legal reasoning as anything other than a patina for protectionism that had the effect of giving short shrift to the Full Faith and Credit Clause.

1. Contrary to the Holding of the Vermont Courts, Apparent Authority May Be Established by Numerous Actions other than a Direct Communication from the Putative Principal to the Third Party.

On appeal, the Vermont Supreme Court held that apparent agency must be established by actual "contacts" or "communications" between the Town Manager or Town Selectmen, on the one hand, and Lakeside, on the other. *Lakeside II*, ¶ 7, 2004 Vt. at ___ , 865 A.2d at 426, App. 6. Lakeside's apparent agency claim must fail, the Vermont Court reasoned, because there was no evidence of such direct "contacts." *Id.*

The Restatement (Second) makes clear that this is one, but only one, of a broader set of means by which apparent agency may be established. Even the elemental

statement of how apparent authority is created makes the overly restrictive reading of the Vermont courts clear:

> **§ 27. Creation of Apparent Authority**
>
> . . . [Exceptions omitted], apparent authority to do an act is created as to a third person by written or spoken words *or any other conduct of the principal* which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him.

Restatement (Second) § 27 (emphasis added).

The commentary to § 27, and the Restatement sections that follow and amplify on this basic statement, make abundantly clear that "other conduct" encompasses a broad range of acts and omissions, the effect of which is to create in the third party an objectively reasonable belief that the agent is authorized to bind the principal in the transaction. Comment a to this section, for instance, makes clear that the putative agent's position *alone* can serve as such a manifestation:

> [A]pparent authority can be created by appointing a person to a position, such as that of manager or treasurer, which carries with it generally recognized duties; to those who know of the appointment *there is apparent authority to do the things ordinarily entrusted to one occupying such a position,* regardless of unknown limitations which are imposed upon the particular agent.

Id. § 27 cmt. a, at 104 (emphasis added).

Similarly, merely permitting the putative agent to act or represent his authority on prior occasions may be sufficient to establish apparent authority:

> [A] person who permits another to do an act in such a way as to establish in a community *a reputation for having authority to act*, either by directing the agent so to represent, or by directing him to act and doing nothing to prevent the spread of such information by the agent or others, creates apparent authority with respect to those who learn of the reputation. *Third persons who are aware of what a continuously employed agent has done are normally entitled to believe that he will continue to have such authority* for at least a limited period in the future, and this apparent authority continues until the third person has been notified or learns facts which should lead him to believe that the agent is no longer authorized.

Id. § 27 cmt. a, at 104. (emphasis added).

Nor is it essential that the third party have explicit information regarding the precise duties exercised by agent:

> [A] manager has authority to do those things which managers in that business at the time and place customarily do, as to persons who know that he is a manager, although they do not know what powers managers in such a business have. In such cases the manifestation

> is interpreted as meaning that the agent has the powers which such managers have . . . .

Id. cmt. d, at 105-06.[15]

2. In an Effort to Deny Illinois' Jurisdiction over this Matter, the Vermont Courts Ignored Substantial Acts and Omissions on the Part of the Town that Were More than Sufficient to Cloak the Town's Officer, Duquette, with Apparent Authority *vis-à-vis* Lakeside.

The record below makes clear that David Duquette was not a stranger to Lakeside when he placed the clarifier order. To the contrary, it is wholly undisputed that he had had ongoing contacts with Lakeside (as well as other out-of-state vendors in the world of sewage treatment equipment) for at least ***two years*** at the time the clarifier order was placed in April, 1996. He had solicited, arranged and participated in a site visit and field inspection of his plant by Lakeside in July, 1994, App. 90; had solicited and received a quote for aeration equipment from Lakeside; and had discussed the clarifier needs repeatedly with Lakeside

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[15] Section 49 of the Restatement (Second) similarly provides that inferences arising from the agent's position are sufficient, *without more*, to establish apparent authority:

> c. *Inferences from agent's position.* Acts are interpreted in the light of ordinary human experience. If a principal puts an agent into, or knowingly permits him to occupy, a position in which according to the *ordinary habits of persons in the* locality, *trade or profession*, it is usual for such an agent to have a particular kind of authority, anyone dealing with him is *justified in inferring that he has such authority*, in the absence of reasons to know otherwise.

Restatement (Second) § 49 cmt. c, at 147 (emphasis added).

and others since at least mid-1994. Lakeside had first hand, indeed compelling, evidence of Duquette's authority; they found him in charge of the Town's sewage treatment plant when they arrived on site; they knew him to have authority to seek quotes; and they knew he had made substantial purchases, *much larger than the one at issue here*, from at least one of Lakeside's competitors, for aeration equipment, as part of more than $100,000 in capital expenditures made in 1994. App. 81-84. This was hardly unusual; Lakeside's replacement parts manager testified at trial that 90% of the firm's nationwide business was with municipalities, and that he dealt exclusively with plant operators. *Lakeside II*, ¶ 7 2004 Vt. at ___, 865 A.2d at 426; App. 6; *see also* App. 64-66 (excerpt of Lakeside parts manager's trial testimony).

Duquette's position, his prior purchases and other acts, and his continuing employment and responsibility in that position thus provided powerful evidence, entirely sufficient to establish apparent authority. As if this were not enough, the Town ***itself*** held out Duquette to the citizenry and the world beyond as the town officer who would be "upgrading the clarifiers" in the summer of 1996, App. 80, and who deserved the praise for installation and operation of the prior capital improvements, *id.* In requiring evidence of a specific "contact" or "communication" emanating from the Town Manager or the Selectmen directly to Lakeside, as a prerequisite for establishing apparent authority, then, the Vermont courts effectively placed a "thumb on the scale" in direct conflict with the common law of agency embraced in both Vermont and Illinois. By failing to lend legal effect to the substantial, undisputed record evidence sufficient to establish Duquette's apparent authority to order parts for the Town plant he managed, in accordance with the Town's representations to the world and his prior acts in his managerial position, the Vermont courts relieved their

municipal corporation of a liability that the law, applied evenhandedly, would have imposed.

C. The Town is Equitably Estopped from Denying Liability for the Good-Faith Acts of its Officer, upon which Lakeside Relied to its Substantial Detriment when it Produced Specially-Manufactured Goods to that Officer's Specifications.

The Vermont courts also gave short shrift to the fundamental principle of estoppel in holding that the Town could disclaim its officer's order for specially-manufactured goods under these circumstances, dismissing Lakeside's estoppel argument as little more than a variant of the apparent authority argument it had already rejected. *Lakeside II*, ¶ 8, 2004 Vt. at ____, 865 A.2d at 426, App. 6. To do so flew in the face of the common law of agency that these courts nominally invoked.

The Restatement itself provides that a principal whose agent did not possess authority (apparent or otherwise) to bind the principal to a transaction may nevertheless be estopped from disclaiming liability for that transaction:

> **§ 8 B. Estoppel – Change of Position**
>
> (1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him if

> (a) he intentionally or carelessly caused such belief, or
>
> (b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts.
>
> * * *
>
> (2) Change of position . . . indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability.

Restatement (Second) § 8 B.

As the commentary to this section makes clear, the essence of estoppel is that the "erroneous belief" that results in harm to one who relied on that belief has been "caused by the one estopped or not corrected by him when he should have done so." *Id.* cmt. a. In a situation in which a third party relies on the agent's authority, but the prerequisites for establishing apparent authority cannot be met, estoppel would nevertheless provide relief for the third party who has changed his position in reliance. *Id.* cmt. b; *see also id.* § 141 cmt. b (estoppel can be created by principal's failure to "take reasonable care to give notice [to the third party] of lack of authority").

Vermont has embraced the doctrine of estoppel for at least a century, *see, e.g., Valiquette v. Clark Bros. Coal Mining Co.* 83 Vt. 538, 543-44, 77 A. 869, 872 (1910). Yet, in the present case, in the face of an out-of-state third party that relied in good faith on the actions and position of the Town's duly-appointed manager to its substantial

detriment, the Vermont Court refused to apply the doctrine to estop the Town from repudiating the officer's acts, suggesting by implication that the evidence failed to establish that the Town was knowledgeable of Duquette's actions and intended to be bound by them. *Lakeside II*, ¶ 8, 2004 Vt. at ____, 865 A.2d at 426, App. 7 (citing elements of estoppel as set forth in *Town of Victory v. Vermont*, 174 Vt. 539, 540, 814 A.2d 369, 372 (2002)). As the Restatement (Second) formulation of estoppel makes clear, all that is necessary is that the Town have been "careless" in permitting third parties to believe in Duquette's authority, or have failed to have taken "reasonable steps" to notify Lakeside of the absence of authority. The record below indisputably demonstrates just that.

CONCLUSION

The Vermont Supreme Court ignored clear evidence of the Town's submission to jurisdiction in Illinois, effecting both a waiver of objections to the exercise of jurisdiction over the Town and an affirmance and ratification of the underlying contract. The Vermont Court also selectively applied the law of apparent agency to deny the relationship between the Town and its appointed officer, detrimentally relied upon by the Petitioner, in a manner that had the effect of frustrating the enforceability of the Illinois judgment. Finally, the state court ignored clear standards of equitable estoppel that would prevent the Town from denying responsibility for the order made by its officer. In order to address the resulting refusal to give meaning to the Full Faith and Credit requirement of the Constitution, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ALAN D. ALBERT
Counsel for the Petitioner

MARCH 2005

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ENTRY ORDER

2004 VT 84

SUPREME COURT DOCKET NO. 2003-193

JUNE TERM, 2004

[ENTERED AUGUST 19, 2004]

Lakeside Equipment Corp.	APPEALED FROM:
v.	Windsor Superior Court
Town of Chester	

DOCKET NO. 153-4-98 Wrcv

Trial Judge: Alan W. Cook

In the above-entitled cause, the Clerk will enter:

¶1. This is the second appeal in this case, which concerns plaintiff Lakeside Equipment Corporation's attempt to domesticate an Illinois judgment requiring defendant Town of Chester to pay Lakeside for equipment the company specially manufactured for the Town's waste water treatment facility. In the first appeal, we reversed the superior court's judgment in favor of Lakeside and remanded the matter for the court to take additional evidence on whether the Town's plant operator, who ordered the equipment from Lakeside, had actual or apparent authority to do so - in which case the Illinois judgment would be jurisdictionally sound. Lakeside Equip. Corp.

v. Town of Chester, 173 Vt. 317, 326, 795 A.2d 1174, 1182 (2002) [hereinafter Lakeside I]. On remand, the trial court entered judgment for the Town after determining that the plant operator did not have either actual or apparent authority to purchase the equipment on the Town's behalf, and that the Town never ratified the purchase. We reject each of Lakeside's arguments on appeal and affirm the superior court's judgment.

¶2. The facts of this case are detailed in Lakeside I. In April 1996, David Duquette, the plant operator of the Town's waste water treatment facility, placed a verbal order with Lakeside, a Delaware corporation based in Illinois, to purchase replacement clarifiers for the facility. Lakeside sent Duquette a letter acknowledging the order and itemizing the cost of the equipment, which totaled approximately $40,000. Duquette eventually gave Lakeside a purchase order number, although apparently the number had been issued for an unrelated purchase. In response to Duquette's order, Lakeside designed and specially manufactured the equipment, and Duquette accepted delivery of the clarifiers in late June 1996. When Lakeside contacted Susan Spaulding, the Chester Town Manager, in late July 1996 to ask about payment for the equipment, Spaulding indicated that the Town would pay the bill within a week. One week later, however, after examining the bill and meeting with the town select board, Spaulding informed Lakeside that the Town would not pay for the equipment because Duquette had not been authorized to purchase it. The Town never used the clarifiers, and Lakeside refused to take them back.

¶3. Lakeside eventually obtained an arbitrator's award, which was later confirmed by an Illinois court, and commenced the present action in the superior court to domesticate the Illinois judgment. The superior court granted summary judgment to Lakeside, and the Town appealed, arguing that Illinois lacked jurisdiction over a Vermont town based upon a contract entered into by an unauthorized agent. We held that although the making of a contract in Illinois would give jurisdiction to Illinois courts to render a personal judgment based on breach of that contract, there were disputed issues of material fact bearing on whether Duquette's actions in entering into the contract could be imputed to the Town. Lakeside 1, 173 Vt. at 324, 795 A.2d at 1180. As a result, we remanded the case for the trial court to take evidence and determine whether Duquette had actual or apparent authority to purchase the equipment, and whether the Town later ratified the agreement reached by Duquette and Lakeside. Id. at 326, 795 A.2d at 1182.

¶4. On remand, following an evidentiary hearing, the superior court refused to enforce the Illinois judgment, ruling that Illinois lacked personal jurisdiction over the Town because no contract ever existed between Lakeside and the Town. The court based this determination on its conclusion that Duquette had neither actual nor apparent authority to purchase the equipment on behalf of the Town, and that the Town never ratified the agreement between Duquette and Lakeside. On appeal, Lakeside argues that the superior court erred by concluding that Duquette had neither actual nor apparent authority to purchase the equipment, and by failing to find either

that the Town was estopped from denying Duquette's authority to purchase the equipment or that a valid contract was created under the Uniform Commercial Code.

¶5. Lakeside first argues that Duquette had express actual authority to purchase the clarifiers. To support this argument, Lakeside relies primarily on Duquette's testimony that Susan Spaulding authorized him in April 1996 to purchase two sets of replacement parts for the clarifiers, and that Duquette supplied Lakeside with a purchase order number. The deficiency in Lakeside's argument is that it ignores the trial court's unchallenged findings supporting the conclusion that neither Spaulding nor any other town official authorized Duquette to purchase the clarifiers. The court found that (1) the town select board and town manager had the authority to make purchases within the budget approved by the voters; (2) the budget approved by town voters in March 1996 for the 1996-1997 fiscal year limited capital expenditures for the waste water treatment facility to $9100; (3) an unwritten town policy authorized the town department heads to make purchases, including capital improvement purchases, within their budgets but without the town manager's prior approval, of up to $500; (4) purchase order authorization numbers were issued when the town manager approved any purchase over $500; and (5) because Duquette had failed to comply with purchasing procedures in the past, he was limited to making purchases of $300 or less without the town manager's approval. Further, the court found credible Spaulding's testimony that neither she nor the select board ever authorized Duquette to purchase the

clarifiers or issued any purchase order for the equipment. Given these findings, Lakeside cannot prevail on its claim that Duquette had express actual authority to purchase the clarifiers.

¶6. Lakeside argues, however, that Duquette had implied actual authority to make the purchase. See New England Educ. Training Serv., Inc. v. Silver St. P'ship, 148 Vt. 99, 103, 528 A.2d 1117, 1119 (1987) (defining implied authority as actual authority circumstantially proven from facts and circumstances surrounding transaction in question). Implied actual authority focuses on whether the principal's actions led the agent to reasonably believe that the principal wanted the agent to act on behalf of the principal with respect to the conduct in question. Sinclair v. Town of Bow, 480 A.2d 173, 177 (N.H. 1984). According to Lakeside, the evidence presented at the hearing on remand demonstrated the reasonableness of Duquette's stated belief that the town manager had authorized him to purchase the clarifiers. In support of this argument, Lakeside cites evidence indicating that the Town had a five-year plan to refurbish its waste water treatment facility, that in the spring of 1996 Spaulding approved replacement of certain parts for the clarifiers, and that Spaulding indicated in a town report that replacement of the clarifiers would begin in 1996. As Lakeside acknowledges, implied authority is actual authority based on the facts and circumstances present. Here, the trial court analyzed the facts and circumstances in reaching its conclusion that no actual authority existed. Central to the court's conclusion was its resolution of the conflict between the testimony of Duquette and Spaulding. The court's findings indicate

that it accepted Spaulding's version of events. In these circumstances, Duquette's subjective belief, even if found credible, cannot prevail over the court's findings.

¶7. Next, Lakeside argues that the trial court erred by concluding that Duquette did not have apparent authority to purchase the equipment. As Lakeside acknowledges, apparent authority " 'derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority.' " Lakeside I, 173 Vt. at 325, 795 A.2d at 1181 (quoting New England Educ. Training Serv., Inc., 148 Vt. at 105, 528 A.2d at 1120). Moreover, as we noted in Lakeside I, the parameters of the doctrine of apparent authority are " 'sharply circumscribed when the principal is a municipal corporation.' " Id. at 325, 795 A.2d at 1181 (quoting City of Norwalk v. Bd. of Labor Relations, 538 A.2d 694, 696 (Conn. 1988)). In this case, there is no evidence of any conduct or communication by the Town directed to Lakeside that would have led the company to conclude that Duquette was authorized to purchase the clarifiers. Further, the trial court found that there was no contact between any town officers and Lakeside, and that Lakeside made no inquiry into the nature and extent of Duquette's authority. Under these circumstances, notwithstanding Lakeside's claim that it was standard practice for the company to purchase equipment through town plant operators, the trial court correctly concluded that Lakeside could not prevail on a theory of apparent authority. See Doe v. Forrest, 2004 VT 37, ¶23, 15 Vt. L. Wk. 125, 53 A.2d 48 (agent's words or conduct cannot create apparent authority; rather, such authority may be found where

third party relies upon agent's misrepresentation because of some misleading conduct by principal); Sinclair, 480 A.2d at 176 (anyone dealing with agent of municipality has duty to ascertain nature and extent of agent's authority).

¶8. Lakeside also argues that the Town of Chester should be estopped from refusing to pay for the equipment. We have already rejected Lakeside's claim of apparent authority, which rests on the general principle of estoppel. See Sinclair, 480 A.2d at 176. Like the doctrine of apparent authority, estoppel is applied against the government "only in rare instances" when the elements of estoppel are met and the injustice that would result from denying estoppel outweighs any negative impact on public policy that would result from applying the doctrine. Larkin v. City of Burlington, 172 Vt. 566, 569, 772 A.2d 553, 558 (2001) (mem.). Here, Lakeside does not even list, let alone examine, the elements of estoppel. In any event, none of the evidence presented at the hearing on remand demonstrates that the Town knew of Duquette's purchase of the clarifiers beforehand, that Lakeside relied upon some conduct by the Town, or that the Town intended any such conduct to be acted upon. See Town of Victory v. State., 174 Vt. 539, 540, 814 A.2d 369, 372 (2002) (mem.) (setting forth elements of equitable estoppel).

¶9. Finally, we find no merit to Lakeside's argument that a valid contract was formed between Lakeside and the Town under § 2-201(3) of the Uniform Commercial Code (UCC). See 9A V.S.A. § 2-201(3). Section 2-201(3) sets forth exceptions to when written

formalities are required for an agreement to be enforced. One of those exceptions is when, under circumstances reasonably indicating that the goods are for the buyer, the seller has made specially manufactured goods not suitable for sale to others in the ordinary course of the seller's business. See id. § 2-201(3)(a). As noted in a leading treatise on the UCC, however, although the exceptions in § 2-201(3) contemplate enforcement of oral contracts under certain circumstances without written formalities, each of those exceptions require that a valid oral contract be proved. See 1 J. White & R. Summers, Uniform Commercial Code § 2.5, at 70 (4th ed. 1995). Here, Lakeside's UCC argument begs the question of whether a valid contract was formed between the Town and Lakeside - which returns us to the question of whether Duquette had actual or apparent authority to act on behalf of the Town. Thus, Lakeside misplaces its reliance on L.V. Appleby, Inc. v. Griffes, 160 Vt. 601, 601-02, 648 A.2d 808, 809 (1993) (mem.), in which the trial court made an unchallenged finding that the parties had entered into a valid contract.

Affirmed.

/s/ John A. Dooley
John A. Dooley, Associate Judge

/s/ Denise R. Johnson
Denise R. Johnson, Associate Judge

/s/ Marilyn S. Skoglund
Marilyn S. Skoglund, Associate Judge

/s/ Paul R. Reiber
Paul R. Reiber, Associate Judge

☐ Publish

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Note: Chief Justice Amestoy sat for oral argument but did not participate in this decision.

STATE OF VERMONT
WINDSOR COUNTY, SS.

[ENTERED: APRIL 1, 2003]

WINDSOR COUNTY SUPERIOR COURT
DOCKET NO. S153-4-98 Wrcv

LAKESIDE EQUIPMENT CORP.,
Plaintiff

v.

TOWN OF CHESTER, VERMONT,
Defendant

FINDINGS, OPINION AND ORDER

INTRODUCTION

The above captioned matter came on for hearing before the undersigned on September 12 and December 23, 2002. Plaintiff is represented by Patrick M. Ankuda, Esq and Defendant by Thomas S. Durkin. The matter is before the Court on remand from the Vermont Supreme Court, based on that Court's decision reported at 173 Vt. 317, filed February 15, 2002.

FINDINGS OF FACT

1. The majority of the facts of this case are recited in the Vermont Supreme Court opinion filed February 15, 2002, are incorporated by reference, and will not all be repeated in these findings. In a nutshell,

this case involves a dispute about the enforcement of an Illinois judgement which requires the Town to pay Lakeside for equipment specially manufactured for the Town's waste water treatment facility. The Supreme Court reversed a Superior Court (Cheever, J.) determination that Lakeside was entitled to summary judgment, and remanded the case to permit the parties to present further evidence on the issues pertaining to the actual or apparent authority of the waste treatment plant operator David Duquette or ratification of the contract by the Town.

2. The Town, a Vermont municipality, operates a waste water treatment facility and is governed by a Board of Selectmen. Susan Spaulding, at all times pertinent, has been the Town Manager and chief purchasing agent.

3. As Town Manager, Spaulding oversees several departments including the Water Department and the Wastewater Treatment Department. Each department has an annual budget which is first proposed to the Town Manager for review, revision and approval; then forwarded to the Selectboard for similar action. The budget approved by the Selectboard is presented for voter approval at Town Meeting. Once the voters approve the budget the Selectboard and Town Manager are authorized to make purchases within the budget. In practice, at the relevant time in this case (1995-1996), Department heads were generally authorized by an unwritten policy to make purchases, including capital improvements within their budgets without prior approval of up to around $500.00. Expenditures for other than routine items purchased

year after year over $500.00 required the prior approval of the Town Manager. Generally speaking this policy was followed.

4. If the Town Manager approved an expenditure over $500.00 by a department head, a purchase order authorization number was issued. The Town Manager's office kept and still keeps a chronological log or record of all authorized purchase orders and the numbers issued.

5. During the period 1994-1996 there were problems with the wastewater treatment plant. The Town Report in 1994 details some of the problems with the system, repairs already made and others that would be needed in the future. The facility was twenty or so years old and the Town was subject to fines by the State. Susan Spaulding had an ultraviolet system installed shortly after she became Town Manager in 1994. However, a twenty year evaluation was due for submission to the State of Vermont in 1995. Bruce Boedther of Bruno Associates in Woodstock, Vermont, was hired to prepare and file the report. The report contained an evaluation of the existing plant and recommended improvements. The Selectboard authorized the report to be filed with the State of Vermont. Quotes from various equipment suppliers, including one dated August 7, 1995 from Lakeside for replacement parts for a clarifier costing $23,116.00, are included in the Appendix. Clearly officials of the Town knew that substantial repair work on the wastewater treatment plant would have to be done.

6. David Duquette was hired as the Wastewater Treatment Plant operator in 1994. He worked with Boedther in the preparation of the twenty year evaluation. He was also told about the Town's purchasing procedures discussed above, in particular the practice of requiring prior Town manager approval for expenditures over $500.00. In addition, at the time of the transaction at issue in this case, because of past problems with Mr. Duquette's compliance with purchasing procedures, his authority to make purchases without prior approval of the Town Manager had previously been reduced to $300.00.

7. The budget approved in March 1996 by the voters of the Town of Chester for the 1996-1997 fiscal year limited capital expenditures for the Wastewater Treatment Plant to $9,100.00.

8. From the fall of 1995 until approximately April 15 of 1996, Mr. Duquette solicited estimates from Lakeside to repair or replace parts and equipment for the wastewater treatment system. This included scraper assemblies, skirt assemblies, clarifiers and weir plates. On or about April 23, 1996 Mr. Duquette orally placed an order with Lakeside for parts and equipment worth approximately $40,092.00 at the time. The Town claims that Duquette did this without obtaining the prior approval of Town Manager Susan Spaulding and that he did not submit a request for a numbered purchase order orally or in writing.

9. Spaulding asserts that the first she knew of the order was in July when the bill arrived. In the meantime Duquette was no longer employed by the

Town. Spaulding denies ever authorizing the order or issuing a purchase order or purchase order number. Spaulding's secretary, Georgia Ethier, who maintains the records regarding purchase orders and purchase order numbers, denies that a purchase order number was ever issued to Duquette. The Court finds the testimony of Spaulding and Ethier to be credible. The Selectboard never authorized the purchase, and the policy at the time was that all expenditures beyond a department's budget had to be approved by the Selectboard. The plan of the Selectboard was to make improvements to the waste water treatment plant gradually over several years.

10. Walter McBride, who took the oral order for Lakeside, testified that Duquette gave him a purchase order number over the telephone which he did not confirm with any town official or any other way. This was the first order Lakeside had ever received from the Town of Chester.

11. Duquette testified that Spaulding was involved with the project all along, and that she specifically authorized him to place the order with Lakeside, something Spaulding denies. Duquette also claims that he provided Mr. McBride's April 23, 1996 letter confirming the oral order to Spaulding, although he could not remember in what manner. On August 1, 1996, after meeting with the Selectboard, Spaulding wrote a letter to Mr. McBride at Lakeside, indicating, among other things, that Duquette had no authority to make such a purchase and that the bill would not be paid. The parts and equipment delivered by Lakeside have neither been returned nor used, and they remain on site.

12. Following Mr. Duquette's verbal order, Walter McBride, an agent of Lakeside, sent written correspondence dated April 23, 1996 which itemized the specially manufactured equipment ordered. In response to that letter, Duquette orally reported to McBride that he had a purchase order number. In fact, Duquette had not received a purchase order number from the Town Manager's office nor had the Town Manager approved the purchase before or after it was made.

13. The equipment was delivered by Lakeside to the wastewater treatment plant on or about June 24, 1996 and accepted by Duquette. Still, the approval of the Town Manager had not been sought or obtained and no numbered written purchase order had been issued. It appears that approval has never been obtained and that no purchase order has ever issued for this equipment.

14. It appears that Lakeside's agent Walter McBride made no independent inquiry of agents or officials of the Town to confirm Duquette's authority to make any purchases, order capital equipment generally or to place this specific order. No Town officer or the Town Manager confirmed with Lakeside that Duquette had authority to place the subject order or ratified the purchase after the delivery.

CONCLUSIONS OF LAW

In its decision dated February 15, 2002, the Vermont Supreme Court has clarified the issues to be decided. *See* Lakeside Equipment Corp. v. Town of

Chester, 173 Vt. 317 (2002). The question at hand is "whether the contacts made by the plant operator can be attributed to the Town so as to impose personal jurisdiction over the Town and otherwise bind the Town." Id. at 322. If Mr. Duquette's actions can be attributed to the Town, then the contract is valid, the Illinois judgment is valid, and Vermont courts must give the Illinois judgment full faith and credit. If Mr. Duquette's actions cannot be attributed to the Town, then the contract is not valid, and the Illinois judgment is invalid due to a lack of personal jurisdiction over the Town.

The Court explained that "[g]enerally, the actions of an agent may be imputed to the principal for purposes of personal jurisdiction if (1) the agent acted within the scope of actual or apparent authority bestowed by the principal; or (2) the principal ratified the agent's actions after the fact." Id. at 324 (citing Myers v. Bennett Law Offices, 238 F.3d 1068, 1073 (9th Cir. 2001)).

Clearly, Mr. Duquette never had actual authority to purchase equipment costing over $40,000. Purchase orders over $500 required prior approval from the Town Manager, but here Ms. Spaulding never approved the purchase. She never issued a purchase order number for this purchase, and the Selectboard never authorized it.

"Apparent authority 'derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority.'" Id. at 325 (quoting New

England Educ. Training Service. Inc. v. Silver Street Partnership, 148 Vt. 99, 105 (1987) (other citations omitted). However, "the parameters of this doctrine 'are sharply circumscribed when the principal is a municipal corporation.'" Id. at 325 (quoting City of Norwalk v. Bd. Of Labor Rel., 538 A.2d 694, 696 (Conn. 1988)). "[A]nyone dealing with a municipality is charged with notice of its limited powers and must, at his peril, inquire into its powers." Laramore & Douglas, Inc. v. City of Anderson, Ind., 222 F.2d 480 (7th Cir. 1955). New Hampshire follows the rule that "[A]nyone dealing with an agent of a municipal corporation is 'bound to ascertain the nature and extent of his authority,' . . . and that consequently a plaintiff 'who relied upon the government official's unauthorized conduct or statements cannot be deemed to have been injured by the government.'" Sinclair v. Town of Bow, 480 A.2d 173, 176 (N.H. 1984) (quoting from Smith v. Epping, 45 A. 415, 416 (N.H. 1899), and from City of Concord v. Tompkins, 471 A.2d 1152, 1156 (N.H. 1984)).

In this case Lakeside relied upon communications from Mr. Duquette when it accepted the order, manufactured and shipped the equipment. Mr. Duquette placed the order, received the equipment, and verbally provided a purchase order number. However, apparent authority to bind the principal must derive from the conduct of the principal. Here Lakeside had no contact with Town officers until after it had already shipped the equipment, and Lakeside never made an independent inquiry into the nature and extent of Mr. Duquette's authority.

The final issue is whether the Town of Chester ratified the contract by subsequent acts. "Ratification is the equivalent of authorization, but it occurs after the fact, when a principal gains knowledge of an unauthorized transaction but then retains the benefits or otherwise takes a position inconsistent with nonaffirmation." Progress Printing Corp. v. Jane Byrne Political Committee, 601 N.E.2d 1055, 1067 (Ill. App. 1992) (citations omitted). "A municipality may become bound to an agreement, despite its agent's lack of authority, by a subsequent ratification of the agreement." City of Norwalk, supra. 538 A.2d at 697. In addressing Lakeside's theory of ratification in this case, the Vermont Supreme Court emphasized that the principal must have full knowledge of all the material facts. *See* Lakeside, 173 Vt. at 325-26 (citing Inn Foods, Inc. v. Equitable Co-op. Bank, 45 F.3d 594, 597 (1st Cir. 1995); and Athanas v. City of Lake Forest, 657 N.E.2d 1031, 1037 (Ill. App. Ct. 1995)).

On July 24, 1996, Town Manager Susan Spaulding spoke with a Lakeside employee and agreed to pay the bill, but at that time Ms. Spaulding did not know the cost of the equipment or that it exceeded the Town's authorization. Standing alone, her statement does not show ratification of the contract.

Furthermore, the evidence does not support any claim that the Town ratified the contract by "long-term acquiescence, after notice, in the benefits of an unauthorized transaction." Athanas, 657 N.E.2d at 1038 (citing Progress Printing Corp., 601 N.E.2d at 1055). First, the Town has never accepted the benefits of the transaction; the equipment remains unused. Second,

the Town responded to Lakeside's claim within a reasonable period of time. As of July 24, 1996, when she first spoke with a Lakeside employee, Town Manager Susan Spaulding did not know the terms of the contract. Soon thereafter, on August 1, 1996, Ms. Spaulding wrote to Mr. McBride at Lakeside, stating that Mr. Duquette had acted without authority and that the Town would not pay the bill.

In sum, the court concludes that there never was a valid contract between Lakeside and the Town of Chester, and that the Town never ratified the agreement. In its decision on February 15, 2002, the Vermont Supreme Court stated that "absent additional evidence demonstrating that actual or apparent authority existed, or that the Town ratified the contract, Lakeside cannot prevail." Lakeside, 173 Vt. at 326. The Superior Court has held further hearings, but Lakeside has not shown actual or apparent authority, or that the Town ratified the contract. The additional evidence supports the Town's position. There never was a contract, and the Illinois judgment is invalid.

ORDER

Judgment is for the Defendant, Town of Chester. The Court DECLARES that there never was a contract between Lakeside Equipment Corp. and the Town of Chester. The Court declines to enforce the judgment from the State of Illinois, based on lack of personal jurisdiction.

Dated at Woodstock, Vermont, this 1st day of April, 2003.

/s/ Alan W. Cook
Hon. Alan W. Cook, Presiding Judge

NOTICE: This opinion is subject to motions for reargument under V.R.A.P. 40 as well as formal revision before publication in the Vermont Reports. Readers are requested to notify the Reporter of Decisions, Vermont Supreme Court, 109 State Street, Montpelier, Vermont 05609-0801 of any errors in order that corrections may be made before this opinion goes to press.

[ENTERED: FEBRUARY 15, 2002]

No. 2000-575

Lakeside Equipment Corp.	Supreme Court
v.	On Appeal from Windsor Superior Court
Town of Chester	December Term, 2001

Alan W. Cheever, J.

Patrick M. Ankuda of Parker & Ankuda, P.C., Springfield, for Plaintiff-Appellee.

Thomas S. Durkin of Kramer & Durkin, P.C., West Dover, for Defendant-Appellant.

PRESENT: Amestoy, C.J., Dooley, Morse, Johnson and Skoglund, JJ.

DOOLEY, J. Defendant Town of Chester appeals the superior court's summary judgment determination that plaintiff Lakeside Equipment

Corporation is entitled to enforcement of an Illinois judgment requiring the Town to pay Lakeside for equipment specially manufactured for the Town's waste water treatment facility. The Town contends that the Illinois judgment is unenforceable because its plant operator was not authorized to order the equipment, and thus there was no basis for exercising personal jurisdiction over it. We conclude that the record is insufficient to determine whether the judgment was jurisdictionally sound; accordingly, we reverse the superior court's decision and remand the matter for further proceedings.

The material facts alleged for purposes of summary judgment are undisputed. Lakeside is a Delaware corporation with a principal place of business in Bartlett, Illinois. On April 15, 1996, David Duquette, the plant operator for the Town's waste water treatment facility, contacted Lakeside and placed a verbal order to purchase replacement clarifiers for the plant. One week later, Lakeside acknowledged the order in a letter that itemized the cost of the equipment, which totaled approximately $40,000. Attached to the letter were the conditions of the sale, including a provision scheduling delivery of the equipment for June 1996. In response to the letter, Duquette sent Lakeside the Town's purchase order number. Lakeside designed and specially manufactured the equipment, and delivered it to the Town on June 24, 1996. Duquette received and accepted the equipment three days later.

On July 24, 1996, a Lakeside employee contacted Susan Spaulding, the Chester Town Manager, to

determine why the Town had not paid for the equipment. Spaulding told the Lakeside employee that payment would be made within the week. The Town paid nothing, however, and later informed Lakeside that it would not pay for the equipment. After making formal demands for payment in September and October 1996, Lakeside submitted a demand for arbitration to the American Arbitration Association pursuant to the contract.

The Association acknowledged receipt of the demand for arbitration and informed the Town of the requested hearing locale in Chicago, Illinois. The Town neither responded to the letter nor participated in the June 24, 1997 hearing held before the arbitrator in Chicago, although it did pay $1000 in arbitration fees. In July 1997, the arbitrator asked the parties to submit briefs regarding jurisdiction and the authority of the Association to conduct the arbitration. Lakeside submitted a brief, but the Town did not respond. On August 25, 1997, the arbitrator entered an award in favor of Lakeside for approximately $51,000. Later, Lakeside petitioned for confirmation of the judgment in the Illinois circuit court. The Town neither responded to Lakeside's petition nor appeared in the Illinois court proceedings. On March 3, 1998, the Illinois circuit court confirmed the arbitration award against the Town and entered a judgment of approximately $53,000.

On March 31, 1998, Lakeside commenced the present action by filing a complaint in the Windsor Superior Court to domesticate the Illinois judgment. The Town appeared, filed an answer, and asserted a

counterclaim challenging the validity of the underlying contract and the jurisdiction of the Illinois courts over the Town. The superior court initially denied Lakeside's motion to dismiss the Town's counterclaim, but later, in its November 3, 2000 decision, granted summary judgment to Lakeside. The court determined that it was required to give full faith and credit to the Illinois judgment because the evidence demonstrated that the Town's contacts with Illinois were sufficient for the courts of that state to assume personal jurisdiction over the Town with respect to the matter at issue. The court also concluded that, to the extent that the Town had valid objections concerning the scope of Duquette's authority to enter into the contract with Lakeside, the Town waived those objections by failing to raise them in the Illinois proceedings.

On appeal, the Town argues that (1) Duquette was without actual or apparent authority to bind the Town to the contract with Lakeside; (2) Lakeside had a duty to confirm the scope of Duquette's authority to bind the Town to the contract; (3) Illinois lacked personal jurisdiction to enter a judgment against a Vermont town based upon a contract entered into by an unauthorized agent; (4) the superior court erred by granting Lakeside's motion for summary judgment after it had denied Lakeside's motion to dismiss the Town's counterclaim; and (5) the superior court failed to give the Town sufficient time to object to the judgment order submitted to the court by Lakeside following the court's decision in favor of Lakeside. We apply the same two-part test as that applied by the trial court: we examine whether there are genuine issues of material fact in dispute, and whether the moving party

is entitled to judgment as a matter of law. See Northern Aircraft, Inc. v. Reed, 154 Vt. 36, 44, 572 A.2d 1382, 1387 (1990).

A sister-state judgment is normally "entitled to full faith and credit in the absence of a showing that [the] court lacked jurisdiction or acted to deprive defendant of a reasonable opportunity to be heard." Wursthaus, Inc. v. Cerreta, 149 Vt. 54, 58, 539 A.2d 534, 537 (1987); see Cook v. Cook, 342 U.S. 126, 128 (1951) (burden of undermining decree of sister state rests heavily upon assailant); Hall v. McCormick, 154 Vt. 592, 595, 580 A.2d 968, 970 (1990) (defendant has "heavy burden" of undermining foreign judgment, which is presumptively valid). Here, the Town contends that it did not have the minimum contacts for the Illinois courts to extend personal jurisdiction over it. In addition to disputing this contention, Lakeside argues that the Town waived its jurisdictional challenge by failing to raise it in the arbitration proceeding, when it had an opportunity to do so.

As a preliminary matter, we reject Lakeside's argument that the Town waived its right to raise the jurisdictional issue in this proceeding to domesticate the Illinois judgment. When a defendant fails to appear after having been served with a complaint in a state and a default judgment is entered, the defendant may defeat enforcement of that judgment in another forum by showing that the judgment was issued by a court lacking personal jurisdiction. See 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4430, at 292 (1981) ("a defendant who makes no appearance whatever remains free to challenge a

default judgment for want of personal jurisdiction"); Hicks v. Evans, 495 S.E.2d 588, 590 (Ga. Ct. App. 1998) (accord); Video Prods. Distribs. v. Kilsey, 682 A.2d 1381, 1382 (R.I. 1996) (per curiam) (accord); cf. Driver v. Driver, 148 Vt. 560, 562, 536 A.2d 557, 558 (1987) ("the jurisdiction of [a] Massachusetts court may be subject to collateral attack in Vermont if jurisdiction had not been contested and determined by the Massachusetts court").

Although the burden of overcoming the default judgment rests with the party attacking it, see Kilsey, 682 A.2d at 1382, where the issue of personal jurisdiction is resolved on summary judgment, the moving party retains the burden of establishing the absence of a genuine issue of material fact and entitlement to prevail as a matter of law. Hudson Drydocks Inc., v. Wyatt Yachts Inc., 760 F.2d 1144, 1146 (11th Cir. 1985). If the defendant in the action to domesticate the foreign default judgment ultimately fails to meet its burden of demonstrating that the judgment is jurisdictionally defective, any challenge on the merits of the lawsuit is foreclosed. See 18 C. Wright, A. Miller, & E. Cooper, supra, at 291 ("Objections to personal jurisdiction remain open to the defendant who remains entirely aloof from the original proceeding, but if it is later concluded that personal jurisdiction existed the merits of the action are foreclosed unless relief can be had from the default judgment.").

Here, the Town chose not to participate in the Illinois proceedings based on its position that its agent had acted outside the scope of his authority, and thus

the agent's contacts with Lakeside could not be imputed to it. Hence, the Town is not precluded from raising a jurisdictional challenge in the instant proceeding. Lakeside's arguments concerning the arbitration and forum-selection provisions contained in the "conditions of sale" attached to the letter sent in response to the plant operator's verbal order are unavailing in that they beg the question at hand - whether the contacts made by the plant operator can be attributed to the Town so as to impose personal jurisdiction over the Town and otherwise bind the Town.

"In determining jurisdiction, the foreign State's law, as limited by due process, controls." Pavey Envelope & Tag Corp. v. Diamond Envelope Corp., 648 N.E.2d 1115, 1117 (Ill. App. Ct. 1995). Under the Illinois long-arm statute, Illinois courts may extend jurisdiction over any person who, in person or through an agent, transacts business within the state or makes or performs a contract substantially connected with the state. See 735 Ill. Comp. Stat. 5/2-209(a)(l), (7) (1992). The statute also provides that an Illinois court may exercise jurisdiction on any other basis permitted under the constitutions of Illinois and the United States. Id. 5/2-209(c). If a basis for jurisdiction exists under the Illinois long-arm statute, the question becomes whether the court's exercise of jurisdiction comports with federal due process. D.S. Am. (East) v. Elmendorf Grafica, 654 N.E.2d 472, 478 (Ill. App. Ct. 1995).

Federal due process is satisfied when the defendant's contacts with the foreign state make it reasonable for the defendant to anticipate being haled into court in that jurisdiction. Id. The principal factors to be considered are (1) whether the nonresident defendant has had minimum contacts with the forum state so that there was fair warning that the defendant might have to defend a lawsuit there; (2) whether the action arose out of the defendant's contacts with the forum state; and (3) whether it is reasonable for the defendant to litigate in the forum state. Id.; see Northern Aircraft, 154 Vt. at 41-42, 572 A.2d at 1386.

In the area of contract law, Illinois courts have determined that a single business transaction may constitute sufficient minimum contacts to confer personal jurisdiction over a non-resident defendant. Allerion. Inc. v. Nueva Icacos, S.A. de C.V., 669 N.E.2d 1158, 1163-64 (Ill. App. Ct. 1996). In such cases, the key factors center around who initiated the contact, where the contract was formed, and where performance was to be made. Id. at 1164. The mere fact that a non-resident defendant entered into a contract with a resident of the forum state to purchase or lease goods may not be enough for the forum state to exercise personal jurisdiction over the defendant, but a buyer who assumes an active rather than a passive role with respect to a transaction is generally subject to personal jurisdiction in the seller's state. See Mellon First United Leasing v. Hansen, 705 N.E.2d 121, 127 (Ill. App. Ct. 1998). The active/passive distinction employed by the Illinois courts seeks to protect "the ordinary mail-order consumer who merely orders a stock item from a catalog while at the same time protecting sellers who

manufacture custom-built products according to the nonresident buyer's specifications." Pavey Envelope, 648 N.E.2d at 1118. Under this analysis, the exercise of personal jurisdiction over a non-resident buyer is justified where the buyer initiated a transaction calling for specially ordered merchandise. Id.

Here, the Town's plant operator, David Duquette, initiated the contact with Lakeside and ordered equipment that had to be custom-manufactured in Illinois to suit the particular requirements of the Town's facility. Duquette also (1) responded to Lakeside's confirmation letter by sending the corporation the Town's purchasing order number, and (2) later accepted delivery of the specially manufactured equipment. These contacts are sufficient to show that the Town played an active role in the transaction if they can be imputed to the Town. The imputation question is the central issue of this case. The superior court held that Duquette's contacts could be imputed to the Town because it was clear from the Chester Town Manager's response to Lakeside's initial request for payment that Duquette had "some" authority to act as the Town's agent to order parts from Lakeside.

Without question, "[t]he due process clause permits personal jurisdiction to be exercised over a defendant based upon acts of its agent." Allerion, 669 N.E.2d at 1164; see 735 Ill. Comp. Stat. 5/2-209(a) (1992). Indeed, the acts of corporations, including municipal corporations, necessarily concern the acts of their agents. Nor is there any question, as the superior court found, that Duquette had some authority to act as

an agent of the Town in purchasing equipment for the waste water treatment facility. The Town effectively acknowledged this fact by agreeing to pay the Lakeside bill at a time when it allegedly was unaware of the extent of the cost of the equipment ordered by Duquette. Nevertheless, we must still determine whether Duquette's conduct in ordering $40,000 in equipment from Lakeside may be imputed to the Town. See Magnecomp Corp. v. Athene Co., 257 Cal. Rptr. 278, 284 (Cal. Ct. App. 1989) (once agency has been determined, question becomes whether acts of agent should be imputed to principal).

Generally, the actions of an agent may be imputed to the principal for purposes of personal jurisdiction if (1) the agent acted within the scope of actual or apparent authority bestowed by the principal; or (2) the principal ratified the agent's actions after the fact. See Myers v. Bennett Law Offices, 238 F.3d 1068, 1073 (9th Cir. 2001). The Town claimed that Duquette had no actual authority to purchase equipment beyond a certain cost without first obtaining the approval of the town selectboard. As the superior court noted, Lakeside has not disputed this claim. Therefore, the record does not demonstrate that Duquette had actual authority to enter into the contract with Lakeside.

Apparent authority "derives from conduct of the principal, communicated or manifested to the third party, which reasonably leads the third party to rely on the agent's authority." New England Educ. Training Serv., Inc. v. Silver Street P'ship, 148 Vt. 99, 105, 528 A.2d 1117, 1120 (1987); see Damian Servs. Corp. v. PLC Servs., Inc., 763 F. Supp. 369, 372 (N.D. Ill. 1991)

(apparent authority exists where principal, through words or conduct, creates reasonable impression that agent has been granted authority to perform certain acts). The purpose underlying the doctrine of apparent authority is "to protect an innocent third party from difficulties in dealings with ... an agent whose actual authority is cut down by limitations unknown to the person with whom he is dealing." Blitz v. Breen, 132 Vt. 455, 459, 321 A.2d 48, 50 (1974).

But the parameters of this doctrine "are sharply circumscribed when the principal is a municipal corporation." City of Norwalk v. Bd. of Labor Rel., 538 A.2d 694, 696 (Conn. 1988). The general rule is that parties who contract with municipal corporations are bound to take notice of the power of a particular person or agency to make the contract. 10 T. Evans & J. O'Gallagher, McQuillin Mun. Corp. § 29.04, at 249 (3d ed. 1999); see Laramore & Douglass, Inc. v. City of Anderson, 222 F.2d 480, 484 (7th Cir. 1955) (anyone dealing with municipality is charged with obligation of inquiring into limitations on powers of its officers or boards); City of Norwalk, 538 A.2d at 696; cf. Sinclair v. Town of Bow, 480 A.2d 173, 176 (N.H. 1984) (rule that anyone dealing with agent of municipality is obligated to ascertain extent of agent's authority effectively excludes municipalities having doctrine of apparent authority applied against them, except to prevent unjust enrichment or manifest injustice).

Here, on the state of the summary judgment record, we find no evidence of a prior course of dealing or other circumstances indicating that the Town signaled to Lakeside that Duquette had the authority to

enter into the contract at issue. Nor do we find ratification by the Town as a matter of law. Although the Chester Town Manager stated to Lakeside's representative that it would pay for the already-delivered equipment, her affidavit indicated that at the time she made the statement she did not know the cost of the equipment or that it exceeded the Town's authorization. See Inn Foods. Inc. v. Equitable Co-op. Bank, 45 F.3d 594, 597 (1st Cir. 1995) (for there to be ratification, principal must have full knowledge of all material facts or must purposely ignore information within its control); Athanas v. City of Lake Forest, 657 N.E.2d 1031, 1037 (Ill. App. Ct. 1995) (ratification occurs when principal, with knowledge of material facts of unauthorized action, takes position inconsistent with nonaffirmation of action).

Nor does the record permit us to conclude that the Town ratified the contract by failing to object to it within a reasonable time after learning what had transpired or by accepting the benefits of the contract. See IBJ Schroder Bank & Trust Co. v. Resolution Trust Corp., 26 F.3d 370, 375 (2d Cir. 1994) (ratification may exist by implication from principal's failure to dissent within reasonable time after learning what had been done); Hardin, Rodriguez & Boivin Anesths., Ltd. v. Paradigm Ins, Co., 962 F.2d 628, 634 (7th Cir. 1992) (principal ratifies contract made by agent when, with knowledge of all material facts, it fails to disaffirm contract within reasonable time and accepts benefits of contract); Progress Printing Corp. v. Jane Byrne Political Comm., 601 N.E.2d 1055, 1067 (Ill. App. Ct. 1992) (ratification may be inferred from long-term acquiescence to benefits of unauthorized transaction).

In short, as the evidence now stands, it is insufficient to demonstrate either that Duquette had actual or apparent authority to enter into the contract with Lakeside or that the Town ratified the contract after the fact. Accordingly, we reverse the superior court's determination that Lakeside is entitled to summary judgment. On remand, the parties may present further evidence concerning the legal questions examined above, but absent additional evidence demonstrating that actual or apparent authority existed, or that the Town ratified the contract, Lakeside cannot prevail. Because of our disposition of the jurisdictional issue, we need not consider the Town's remaining arguments.

Reversed and remanded.

FOR THE COURT:

/s/
Associate Justice

ENTRY ORDER

[ENTERED: FEBRUARY 15, 2002]

SUPREME COURT DOCKET NO. 2000-575

DECEMBER TERM, 2001

Lakeside Equipment Corp.	APPEALED FROM:
v.	Windsor Superior Court
Town of Chester	DOCKET NO. 153-4-98 Wrcv

In the above-entitled cause, the Clerk will enter:

Reversed and remanded.

FOR THE COURT:

/s/ John A. Dooley
John. A. Dooley,
Associate Justice

Concurring:

/s/ Jeffrey L. Amestory
Jeffrey L. Amestoy,
Chief Justice

/s/ James L. Morse
James L. Morse
Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson,
Associate Justice

/s/ Marilyn S. Skoglund
Marilyn S. Skoglund,
Associate Justice

STATE OF VERMONT
WINDSOR COUNTY, SS.

WINDSOR SUPERIOR COURT
DOCKET NO. S153-4-98 Wrcv

[ENTERED: NOVEMBER 3, 2000]

LAKESIDE EQUIPMENT CORP.,
Plaintiff

v.

TOWN OF CHESTER, VERMONT,
Defendant

DECISION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (NO. 3)

INTRODUCTION

Plaintiff Lakeside seeks to enforce an Illinois judgment which was based upon an arbitrator's award. Defendant Town of Chester, Vermont, has filed a counterclaim, seeking a declaration that no valid contract ever existed between the parties.

In an earlier decision, the Superior Court denied Lakeside's motion to dismiss the counterclaim, holding that the Town was not precluded from arguing that the Illinois proceedings were not based upon a proper determination of personal jurisdiction over the Town. See Decision Re: Motion to Dismiss Counterclaim, 3 Vt.Tr.Ct.Rep. 167 (Norton, J., 10/14/98).

Lakeside has moved for summary judgment, arguing that the parties entered into a contract under U.C.C. Article 2, that the Illinois proceedings complied with the requirements of due process, and that this court should give full faith and credit to the Illinois judgment.

Attorney Patrick M. Ankuda represents Lakeside; Attorney Thomas S. Durkin represents Town of Chester. Lakeside filed its motion on April 4, 2000; Town filed a response on July 20, 2000; and Lakeside filed a reply on August 31, 2000.

Each party has submitted a Statement of Material Facts, supported by affidavits and other documents. However, (1) the Town's statement of facts does not specifically respond to Lakeside's statement of facts, instead using a separate numbering system, (2) in some instances the stated facts do not include citations to the record, and (3) in other instances the stated facts are not supported by the documents that are cited. Where the stated facts are supported by the record, and not controverted by opposing facts which are also supported by the record, the court will deem the facts as undisputed for purposes of addressing the motion for summary judgment. *See* V.R.C.P. 56(c)(2).

FACTS

The following facts are undisputed, except where a dispute is noted:

1. The plaintiff Lakeside Equipment Corp. (Lakeside) is a Delaware corporation with a

principal place of business in Bartlett, Illinois. Lakeside designs, fabricates and delivers equipment for waste water treatment plants.

2. The defendant Town of Chester (Town) is a duly-authorized municipal corporation organized and existing under the laws of the State of Vermont. The Town owns and operates a municipal waste water treatment plant, providing waste water treatment services within the Town.

3. At all times relevant to Lakeside's claims, Mr. David Duquette was an employee of the Town, with the title Plant Operator of the Town's waste water treatment facility.

4. On or about April 15, 1996, Mr. Duquette contacted Lakeside and placed a verbal order to purchase replacement clarifiers for the plant.

5. Lakeside acknowledged the above-referenced order in writing by letter of Mr. Walter McBride dated April 23, 1996.

6. In the April 23, 1996 letter, Mr. McBride itemized costs of the equipment ordered by Mr. Duquette. The Total Cost of the equipment was listed as $40,092.00. The letter included the following paragraph:

> The above prices are f.o.b. factory with freight allowed to the job site. Terms of payment are net 30 days from date of shipment and the Conditions of Sale are

in accordance with GIL-93, copy attached. Shipment is scheduled for the week of 06/10/96.

7. The Conditions of Sale form attached to Mr. McBride's letter of April 23, 1996 specifically provided:

You are hereby notified that unless we receive notice (as a part of your Purchase Order, or in a separate writing, if acceptance is oral) of your rejection of any of these conditions, these conditions shall become a part of the agreement between us. Acceptance is good only when received by us at our offices in Bartlett, Illinois.

8. Lakeside received no notice of rejection of the terms contained in the Conditions of Sale form from either Mr. Duquette or the Town.

9. Rather, the Town, through Mr. Duquette, supplied Lakeside with the Town's Purchase Order Number.

10. The Town's order for clarifiers (as submitted to Lakeside by Mr. Duquette) was an order for customized equipment. The clarifier equipment required special custom manufacturing by Lakeside.

11. Accordingly, Lakeside designed the equipment, had it specially manufactured, and on June 24, 1996, shipped it to Chester, Vermont.

12. Mr. Duquette received and accepted the equipment on behalf of the Town on June 27, 1996.

13. The Conditions of Sale form attached to Mr. McBride's letter dated April 23, 1996, required notification consistent with the Uniform Commercial Code (U.C.C.) of any non-conformance or shortages within 20 days after delivery.

14. Neither the Town nor its Plant Operator (Mr. Duquette) notified Lakeside of any non-conformance or shortage in the clarifier equipment.

15. On July 24, 1996, after failing to receive payment from the Town consistent with its contract, Lakeside checked on payment. Ms. Karen Wolk, Controller for Lakeside, telephoned the Town of Chester to find out when payment would be sent. She spoke with Chester Town Manager Susan Spaulding. Ms. Spaulding told Ms. Wolk that the check for payment of the invoice for Lakeside's equipment would go out on July 31, 1996, which was one week later.

16. The Town paid nothing. More than 30 days later Lakeside received written notice from the Town that the Town refused to purchase the equipment already manufactured and delivered to it.

17. On September 6, 1996, and again on October 10, 1996, Lakeside, by and through its attorney Eric M. Johnson, demanded payment.

18. Despite the demands, the Town did not pay Lakeside.

19(a). The Conditions of Sale form included an arbitration provision, including a forum selection clause, as follows:

> ARBITRATION: Any controversy or claim arising out of or relating to this contract, or any modification thereof, shall be settled in Kane County, Illinois, by Arbitration in accordance with the laws of the State of Illinois, and the current Rules of the American Arbitration Association, and the parties consent to jurisdiction of the Circuit Court for the 16th Judicial Circuit, Kane County, State of Illinois, and further consent that any process or notice of Motion or other application to such Court or a Judge thereof may be served outside the State of Illinois by Registered Mail or by personal service, provided a reasonable time for appearance is allowed. Judgement upon award rendered by the Arbitrator may be entered in any Court having jurisdiction hereof, which shall include the County of arbitration.

19(b). The Town never objected to the terms of the Conditions of Sale form. Pursuant to the arbitration provision, on or about November 26, 1996, Lakeside submitted a demand for arbitration with the American Arbitration Association (AAA).

20. The Town received notice of the Demand for Arbitration.

21. The Town did not respond in accordance with the Demand for Arbitration.

22. By letter dated December 18, 1996, the AAA acknowledged receipt of the Demand for Arbitration and notified the Town.

23. The letter from the AAA noted the requested hearing locale in Chicago and the appointment of the arbitrator with a request for any objections.

24. The Town did not respond to the letter from the AAA dated December 18, 1996.

25. On June 5, 1997, in a letter addressed both to Lakeside's attorney and to the Town, the AAA provided notice that a hearing was scheduled to take place on June 24, 1997.

26. The Town did not respond to the letter from the AAA dated June 5, 1997.

27. On June 24, 1997, AAA Arbitrator Donald E. Casey held a hearing on Lakeside's claim against the Town.

28. The Town did not attend the hearing on June 24, 1997, although the Town did pay $1, 000.00 toward the AAA fees.

29. The Arbitrator heard Lakeside's testimony and accepted a Trial Memorandum prepared by Lakeside's attorney.

30. On July 19, 1997, by letter to both Lakeside and the Town, the Arbitrator asked for additional briefing regarding jurisdiction and the authority of the AAA to conduct the arbitration.

31. On July 31, 1997 Lakeside's attorney filed a Brief regarding jurisdiction and the authority of the AAA. Lakeside provided a copy of its brief to the Town.

32. At that time, the Town did not file any response to Lakeside's claim of jurisdiction.

33. Thereafter, on August 25, 1997, the Arbitrator Donald E. Casey entered his Award in favor of Lakeside. The Award called for the Town to pay Lakeside $50,890.06.

34. The AAA served the Award upon the Town on August 27, 1997.

35. At that time, the Town did nothing in response to the Arbitrator's Award.

36. Pursuant to the Illinois Uniform Arbitration Act, 710 ILCS 5/1, on or about January 28, 1998, Lakeside filed a "Petition for Confirmation of Arbitration Award And For Entry Of Judgment On Award" in the Circuit Court for the 16th Judicial Circuit, Kane County, State of Illinois.

37. On January 29, 1998, Lakeside sent Notice of Filing to the Town, by registered mail in accordance with the contract.

38. The Town did not appear in the Illinois court proceedings, nor did the Town file an Answer to Lakeside's Petition.

39. In the Illinois court proceedings, the Town did not raise grounds for vacating, modifying or correcting the Arbitration Award.

40. At that time, the Town did not raise grounds for vacating, modifying or correcting the Arbitration Award, in the state courts for the State of Vermont.

41. On or about March 3, 1998, the Illinois Court entered its "Order Confirming Arbitration Award" and "Order of Judgment Upon Confirmation of Arbitration Award" against the Town, in the amount of $52,695.15 with statutory interest.

42. On or about March 31, 1998, Lakeside commenced this action by duly serving its Complaint to Domesticate and Enforce a Foreign Judgment on the Town's agent, John Coleman. Lakeside filed its Complaint in this court on April 3, 1998.

43. On or about May 14, 1998, the Town appeared in this case, filed an Answer to the Plaintiffs Complaint, and asserted a Counterclaim for Declaratory Relief. In its counterclaim, the Town, for the first time, challenged the validity of the

parties' contract, the Arbitrator's Award, and the assertion of personal jurisdiction over the Town in the courts of Illinois.

44. On June 15, 1998, Lakeside submitted a Motion to Dismiss the Counterclaim. The parties exchanged pleadings.

45. On October 14, 1998, this court denied Lakeside's motion to dismiss the Town's Counterclaim, holding that the Town was not precluded from arguing that the Illinois Judgment was defective based on lack of personal jurisdiction. See Decision Re: Motion to Dismiss Counterclaim (No. 1), S153-4-98 Wrcv, 3 Vt.Tr.Ct.Rep. 167 (Norton, J., 10/14/98).

46. (Town's ¶ 1) In its Statement of Fact Paragraph 1, the Town asserts that the Town "has had no contacts, minimal or otherwise, with [Lakeside's] home state of Illinois that are relevant to the subject matter of this case."

The Town cites to three affidavits from Town Manager Susan Spaulding as support for this assertion. However, the affidavits do not support the Town's assertion. In fact, Ms. Spaulding acknowledges that certain contacts took place, including the Town's payment of $1,000.00 to the AAA for the arbitration proceedings which took place in Illinois, and her own telephone conversation with Karen Wolk, which is described above in Paragraph 15. Ms. Spaulding agrees that the telephone conversation took place, but she states that she had not yet received an invoice from Mr. Duquette, and that she assumed Lakeside's invoice was

only for the rehab parts Mr. Duquette was ordering (i.e. for a lesser amount). Ms. Spaulding told the inquirer that the Town would process payment immediately. However, after the telephone call Ms. Spaulding learned that Mr. Duquette had ordered more equipment than the "rehab parts" that had been authorized by the Town.

47. (Town's ¶ 2) David Duquette, the fired Chester Waste Treatment Plant employee, upon whose affidavit Lakeside relies in its Motion for Summary Judgment, never had the authority to purchase the equipment in the name of the Town of Chester, nonpayment of which forms the basis for Lakeside's claim in this case.

48. (Town's ¶ 3) The Town has procedures for capital improvement purchases that the Town follows in the ordering and purchasing of capital improvements and equipment. None of those procedures were followed by Mr. Duquette or Lakeside in the ordering and invoicing of the equipment in this case.

49. (Town's ¶ 4) Had Lakeside followed a standard procedure of verifying Mr. Duquette's authority (or lack thereof) to order such equipment, the Town would have confirmed for Lakeside that Mr. Duquette was acting beyond his authority.

50. (Town's ¶ 5) Mr. Duquette never gave notice to the Town, its Town Manager or its Selectboard of his intention to order the disputed equipment from Lakeside.

51. (Town's ¶ 6) In fact, Mr. Duquette submitted a capital improvement budget to the Town Selectboard that called only for the plant clarifiers to be "rehabbed" and not replaced. His budget contained two line items for the rehab equipment, each of which costs no more than $4,700.00 and totaled $9,100.00.

52. (Town's ¶ 7) Mr. Duquette was fired by the Town because he acted improperly prior to the Town being made aware of his improper ordering of the Lakeside equipment. Had the Town been told by Lakeside or Mr. Duquette that he had ordered this equipment from Lakeside, he would have been fired for that separate improper conduct and action beyond his scope of authority.

53. (Town's ¶ 8) In its Statement of Fact Paragraph 8, The Town asserts: "When Lakeside advised the Town that it had delivered equipment ordered by Mr. Duquette, the Town timely advised Lakeside that the equipment had not been authorized or properly ordered. The Town requested that Lakeside receive the equipment back and acknowledge that Mr. Duquette acted beyond his authority. Lakeside failed and refused to do so."

The Town does not provide any citation to the record in support of these assertions. Given the lack of any citation, the court cannot determine the timing of any of the described events. The affidavits from Susan Spaulding do not provide the pertinent dates. The Town's assertions in this paragraph do not contravene Lakeside's assertions, which are supported in the

record, that Lakeside sent a letter describing the order on April 23, 1996 (¶¶ 5-6), that Lakeside shipped the equipment on June 24, 1996 (¶ 11), that Mr. Duquette received and accepted the equipment on behalf of the Town on June 27, 1996 (¶ 12), that Karen Wolk of Lakeside telephone Chester Town Manager Susan Spaulding on July 24, 1996, and was told that the Town would send payment of the invoice within a week (¶ 15), and that more than 30 days later, Lakeside received written notice from the Town that the Town refused to purchase the equipment. (¶ 16).

54. (Town's ¶ 9) In its Statement of Fact Paragraph 9, the Town asserts: "Given that the Town had not authorized the ordering of this equipment or otherwise entered into a contract with Lakeside Equipment for the same, the Town did not believe it had the obligation to incur the expense of traveling to the foreign jurisdiction to defend itself against Lakeside's unsubstantiated claim. The Town directed its attorney to so advise Lakeside of its belief that no valid contract existed. Lakeside chose to ignore the Town's advice."

Again, the Town does not provide any citation to the record in support of its assertions. For purposes of this motion, the court will accept, as undisputed, the fact that the Selectboard never provided formal authorization for this particular purchase of equipment from Lakeside. However, the court cannot accept, as a fact supported by documents in the record, the Town's assertion that "the Town had not . . . otherwise entered into a contract with Lakeside Equipment for [this equipment]." The latter statement confuses assertions

of fact with legal argument, and it does not contravene Lakeside's assertions, which are supported in the record. The Town's assertion of "fact" ignores Lakeside's claim in this case, which is that a contract may be formed by methods other than formal authorization by the Selectboard.

55. (Town's ¶ 10) In its Statement of Fact Paragraph 10, the Town asserts: "Had the Town voluntarily decided to travel to the State of Illinois to assert its defense of lack of personal jurisdiction, the Town would have incurred additional and unnecessary legal expenses and travel costs. The Town would have also risked that Lakeside would have claimed that the Town had waived its defense of lack of personal jurisdiction, by voluntarily appearing in a foreign court that had no jurisdiction over the Town."

Once again, the Town does not provide any citation to the record in support of its assertions, and once again the Town confuses assertions of fact with legal argument. Furthermore, any facts that are asserted within this paragraph are not material to the issues before the court.

56. (Town's ¶ 11) In its Statement of Fact Paragraph 11, the Town asserts: "The Town repeatedly offered to return the equipment lo Lakeside and to assist Lakeside in mitigating the damages caused by Mr. Duquette's improper ordering of this equipment. Lakeside has continually failed and refused the Town's request."

Once again, the Town does not provide any citation to the record in support of its assertions, and once again, the facts asserted within this paragraph are not material to the issues before the court.

CONCLUSIONS OF LAW

Summary Judgment

Lakeside has moved for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." V.R.C.P. 56(c)(3). In determining whether a genuine issue of fact exists, the nonmoving party receives the benefit of all reasonable doubts and inferences; however; allegations to the contrary must be supported by specific facts sufficient to create a genuine issue of material fact. Samplid Enterprises. Inc. v. First Vermont Bank, 165 Vt. 22 (1996).

Under V.R.C.P. 56(c)(2), the parties are required to file statements of the material facts. The party seeking summary judgment submits a statement of facts it considers to be undisputed. The opposing party then responds by filing its own statement of material facts, explaining where there exists a genuine issue to be tried. "All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." V.R.C.P. 56(c)(2). Where the moving party's

stated facts are supported by the record, and not controverted by opposing facts which are also supported by the record, then the court will deem the facts as undisputed for purposes of addressing the motion for summary judgment. See Richart v. Jackson, 11 Vt.L.W. 160, 161 (2000) (citing V.R.C.P. 56(c)(2)).

Lakeside's Motion for Summary Judgment

In its motion for summary judgment, Lakeside argues that the Illinois proceedings were based upon a proper determination of personal jurisdiction over the Town, and that therefore this court should give full faith and credit to the Illinois judgment. Lakeside contends that the Town had sufficient minimum contacts with Lakeside (in Illinois), that those contacts were sufficient to create a contract under U.C.C. Article 2, and that therefore there is no basis for setting aside the Illinois judgment, which is based upon a valid arbitrator's award.

In an earlier decision dated October 14, 1998, this court held that the Town may contest the Illinois proceedings by presenting evidence that Illinois lacked personal jurisdiction over the Town. *See* Decision Re: Motion to Dismiss Counterclaim, 3 Vt.Tr.Ct.Rep. 167 (Norton, J., 10/14/98). However, in that same decision, the court recognized that the *res judicata* effects from an arbitration proceeding are strong:

> "Vermont has a strong tradition of upholding arbitration awards whenever possible." *Springfield Teachers Association v. Springfield School Directors,* [167 Vt. 180,

> 183] (1997) (quoting *R.E. Bean Constr. Co. v. Middlebury Assocs.*, 139 Vt. 200, 204 (1980)). Arbitration is an important alternative to litigation for the efficient resolution of disputes. *Id.* (citing *In re Robinson/Keir Partnership*, 154 Vt. 50, 53 (1990)). "If courts were permitted to broadly question the determinations of an arbitrator, then arbitration would become merely 'another expensive and time consuming layer to the already complex litigation process.'" *Id.* (quoting *R.E. Bean Constr. Co.*, 139 Vt. at 204-205). Even on direct appeal, a court's review is limited to "(1) whether there exist statutory grounds for vacating or modifying the arbitration award, and (2) whether the parties were afforded due process." *Id.* (citing *Matzen Constr. Inc. v. Leander Anderson Corp.*, 152 Vt. 174, 177(1989)).

For the reasons discussed in the October 14, 1998 decision, the initial focus of this case is on the personal jurisdiction asserted in the Illinois proceedings. If the Illinois judgment is valid, then this court must give it full faith and credit. At this stage, the Town may not raise any other defenses. "The usefulness of arbitration is undermined if issues can be withheld from the arbitrator and raised for the first time in court long after the arbitration is over." Springfield Teachers Association, 167 Vt. at 190.

Personal Jurisdiction

For the reasons discussed above, Lakeside's motion focuses on the issue of whether or not the Illinois proceedings complied with the due process requirement of personal jurisdiction.

> "The Due Process Clause limits the power of a state court to render judgments against nonresident defendants. . . . In order to invoke personal jurisdiction over an individual defendant, the defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Northern Aircraft. Inc. v. Reed*, 154 Vt. 36, 41 (1990) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), which in turn quoted *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

Decision Re: Motion to Dismiss Counterclaim, 3 Vt.Tr.Ct.Rep. at 168.

It is firmly established that the requirement of "minimum contacts" is satisfied "when the defendant purposefully directs activity toward residents of a forum state and the litigation arises out of, or relates to, that activity." Pall v. Kaylor, 163 Vt. 274, 276 (1995) (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); and Northern Aircraft. Inc. v. Reed, 154 Vt. 36, 41 (1990)). The Vermont Supreme Court recently

reaffirmed this principle in Brown v. Cal Dykstra Equipment Company, 169 Vt. 636 (1999). These cases support the proposition that when a Vermont entity initiates a contract with an entity in another state, the Vermont entity submits to personal jurisdiction in the foreign state. A few miscellaneous phone calls or letters, without any connection to contracts or other legal obligations, will not give rise to personal jurisdiction. Schwartz v. Frankenhoff, 169 Vt. 287 (1999). However, the clear allegations in this case are that representatives of the Town initiated the contacts with Lakeside in Illinois, and that the parties actually formed a contract.

The Nature of the Contacts in This Case

The undisputed facts of this case show that on or about April 15, 1996, Mr. Duquette, the Plant Operator of the Town's waste water treatment facility, contacted Lakeside in Illinois and placed a verbal order. On April 23, 1996, Lakeside acknowledged Mr. Duquette's order in writing, by letter of Mr. Walter McBride dated April 23, 1996. Mr. McBride's letter itemized the costs of the equipment ordered, and listed the total cost as $40,092.00. Mr. McBride's letter also included a form stating the Conditions of Sale.

Lakeside received no notice of rejection from either Mr. Duquette or the Town. Instead, the Town, through Mr. Duquette, supplied Lakeside with the Town's Purchase Order Number. Lakeside designed the equipment, had it specially manufactured, and shipped it to the Town on June 24, 1996. Mr. Duquette received and accepted the equipment on behalf of the

Town on June 27, 1996. Neither the Town nor Mr. Duquette notified Lakeside of any non-conformance or shortage in the equipment. As of July 24, 1996, Lakeside had not received payment from the Town. Lakeside Controller Karen Wolk telephoned the Town of Chester to find out when payment would be sent. She spoke with Chester Town Manager Susan Spaulding. Ms. Spaulding told Ms. Wolk that the check for payment of the invoice for Lakeside's equipment would go out on July 31, 1996, which was one week later than the telephone call.

The Town paid nothing. More than 30 days later, Lakeside received written notice from the Town that the Town refused to purchase the equipment.

At that time, the Town objected that the specific contract had not been authorized by the appropriate procedures. At that time, the Town did not argue that there had never existed any contract between the Town and Lakeside. Even when the arbitrator scheduled a hearing, the Town did not argue that the arbitrator lacked jurisdiction to hear the case. In fact, the Town paid $1,000.00 toward the arbitrator's fee. It was not until later, after Lakeside had filed this case in the Windsor Superior Court, that the Town, for the first time, challenged the arbitrator's assertion of personal jurisdiction in the State of Illinois.

Application

The narrow issue for this court to address is whether the Town's contacts with Lakeside were sufficient to support personal jurisdiction over the

Town in the State of Illinois. In this regard several issues are clear:

First, it is clear that the initial contact was made by Mr. Duquette, who was the Plant Operator of the Town's waste water treatment facility. Mr. Duquette called Lakeside and ordered special equipment for use at the Town's facility. Lakeside wrote up a description of the order and sent the order to the Town in a letter dated April 23, 1996. Lakeside received a Purchase Order Number from the Town. Lakeside manufactured the equipment and had it delivered to the Town. Mr. Duquette accepted the equipment on behalf of the Town of June 27, 1996. At least through the end of July 1996, the Town did not respond with any objections to the order.

Second, it is clear that the Town provided some authorization to Mr. Duquette to purchase equipment from Lakeside. Mr. Duquette had submitted a budget for the purchase of rehab equipment. (Facts ¶ 51). When Lakeside telephoned and spoke with Town Manager Susan Spaulding about payment for the equipment that had been sent, the Town Manager said that the invoice would be paid. (Facts ¶ 15). The Town argued that Ms. Spaulding had misunderstood the specific terms of the contract in question. (See Facts ¶ 46). However, Ms. Spaulding did not object to Lakeside's request on the ground that there was no contract. Indeed, the Town has never argued that Mr. Duquette was completely lacking in authorization, nor has the Town argued that there never was any contract. Lakeside argues that the series of events establishes a contract for sale of goods, under the provisions of the

U.C.C. According to 9A V.S.A. § 2-204(1), "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." To the extent there is a writing requirement, that requirement is satisfied by the Town's lack of response to Lakeside's letter dated April 23, 1996. *See* 9A V.S.A. § 2-201(2). Lakeside also asserts, without contradiction, that the equipment was specially manufactured for the Town (9A V.S.A. § 2-201(3)(a)), and that the goods were received and accepted (9A V.S.A. § 2-201, Official Comment 2).

Conclusions

Based on the undisputed facts of this case, the court concludes that the Town had contacts with Lakeside that were sufficient to establish personal jurisdiction in the State of Illinois. Mr. Duquette initiated the contact with Lakeside, on the Town's behalf. It is clear that Mr. Duquette had some actual authority to order parts from Lakeside. When Susan Spaulding was contacted directly by Lakeside, she told the Lakeside Controller that the Town would pay the invoice. Thus she acknowledged that the Town had at least "minimum contacts" with Lakeside, and that those minimum contacts were related to a contract for parts.

It is not necessary for this court to determine the precise terms of any contract between the Town and Lakeside. Given the facts that a representative of the Town initiated contract negotiations with Lakeside, that the representative had some actual authority from the Town, and that a contract was actually formed, it is

impossible to escape the conclusion that the Town had at least "minimum contacts" with the Slate of Illinois.

Therefore, the Town has no defense to Lakeside's action for enforcement of the Illinois judgment. This court must give full faith and credit to the Illinois judgment. To the extent the Town may have had valid objections to the scope of Mr. Duquette's authority, or to the precise terms of the contract, the Town waived those objections by failing to participate in the arbitration proceedings in Illinois.

ORDER

The Plaintiff's Motion for Summary Judgment is GRANTED. Plaintiff's attorney shall prepare a Judgment Order for the Court's consideration.

Dated this 3 day of November, 2000.

/s/ Alan W. Cheever
Hon. Alan W. Cheever,
Presiding Superior Court Judge

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

[ENTERED MARCH 3, 1998]

LAKESIDE EQUIPMENT CORPORATION,
a Delaware Corporation,
Plaintiff,
vs.
TOWN OF CHESTER, VERMONT,
Defendant.

General No. L KA 98 0045

ORDER CONFIRMING ARBITRATION AWARD

THIS CAUSE coming on the verified PETITION FOR CONFIRMATION OF ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT ON LAKESIDE EQUIPMENT CORPORATION, a Delaware Corporation ("Lakeside"), by and through its attorneys, GROMER & WITTENSTROM, P.C., and against the Defendant, the TOWN OF CHESTER, VERMONT ("Chester"), made pursuant to the contract between the parties and pursuant to the Uniform Arbitration Act, 710 ILCS 5/1, and the Court being otherwise fully advised in the premises,

IT IS THE FINDING OF THIS COURT THAT:

1. The Award of the Arbitrator was entered on August 25, 1997, in the amount of $50,890.06, upon the contract between the parties authorizing such arbitration;

2. Pursuant to the Uniform Arbitration Act, 710 ILCS 5/11, entitled "Confirmation of an award", the legislature has provided that:

> "Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.";

3. The award was served upon the Defendant on August 27, 1997, and 90 days have passed since such date (on November 25, 1997);

4. Plaintiff has sent Notice of Filing and has filed proof of service of summons upon the Town of Chester by registered mail on January 29, 1998, as required by the contract between the parties;

5. Defendant Town of Chester has failed to urge grounds for vacating, modifying, or correcting the award within the 90 days after entry of the Award, has failed answer or otherwise plead since being served with summons, and has not appeared on this date, requiring that this Court upon application "shall confirm an award", which Plaintiff has requested pursuant to the Act;

NOW, THEREFORE, IT IS HEREBY ORDERED, that Plaintiffs PETITION FOR CONFIRMATION OF ARBITRATION AWARD is hereby granted, the Award of the Arbitrator dated

August 25, 1997, a copy of which is attached to this Order, is hereby confirmed in the amount of $50,890.06, pursuant to 710 ILCS 5/11, and as otherwise set forth in the award.

Date: March 3, 1998

/s/ Roger W. Eichmeier
Judge

Prepared by:
Eric M. Johnson
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ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-193

NOVEMBER TERM, 2003

[ENTERED DECEMBER 16, 2004]

Lakeside Equipment Corp.

v. APPEALED FROM:
Windsor Superior Court

Town of Chester

DOCKET NO. 153-4-98 Wrcv

In the above-entitled cause, the Clerk will enter:

Appellant's motion to reargue, filed October 1,2004, fails to identify points of law or fact overlooked or misapprehended by this Court. In addition, appellant's argument on the applicability of the Uniform Arbitration Act is not a proper grounds for reargument because it was raised for the first time in the motion to reargue. Coolidge v. Coolidge, 130 Vt. 132, 135 (1972). The motion is therefore denied. Sec V.R.A.P. 40.

BY THE COURT:

/s/ John A. Dooley
John A. Dooley, Associate Justice

/s/ Denise R. Johnson
Denise R. Johnson, Associate Justice

/s/ Marilyn S. Skoglund
Marilyn S. Skoglund, Associate Justice

/s/ Paul L. Reiber
Paul L. Reiber, Associate Justice

STATE OF VERMONT

WINDSOR COUNTY, SS.

LAKESIDE EQUIPMENT CORP.	)
Windsor Superior Court	)
V.	)
TOWN OF CHESTER, VERMONT	)

Docket No. 153-4-98 Wrcv

EXCERPT OF TRIAL TESTIMONY OF
WALTER MCBRIDE
LAKESIDE EQUIPMENT CORP.'S PARTS MANAGER
SEPTEMBER 12, 2002

* * *

[Trial Tr. 150-151]

Q. Describe for the Court the customers, the typical customers of Lakeside Equipment.

A. The majority of our customers are municipalities.

Q. What percentage of your customers are municipalities?

A. I would say at least ninety percent.

* * *

[Trial Tr. at 162]

Q. Now, you, as the replacement parts manager, dealt solely with Mr. Duquette; isn't that correct?

A. That is correct.

Q. And he was the plant operator of Chester wastewater treatment facility?

A. That was my understanding.

Q. Was it routine in your business to deal solely with plant operators?

A. Yes, we do it all the time.

Q. Particularly on parts orders?

A. Yes.

Q. So as far as you saw, there was nothing unusual about that in your business to deal with Mr. Duquette?

A. No, none at all.

STATE OF VERMONT
WINDSOR COUNTY, SS.

WINDSOR SUPERIOR COURT
DOCKET NO.

LAKESIDE EQUIPMENT CORP.,
Plaintiff,
vs.
TOWN OF CHESTER, VERMONT,
Defendant.

COMPLAINT TO DOMESTICATE AND ENFORCE FOREIGN JUDGMENT

NOW COMES the Plaintiff, Lakeside Equipment Corp., by and through its attorneys, Parker & Ankuda, P.C., and complains against the Defendant, Town of Chester, Vermont as follows:

1. The Plaintiff is a Delaware Corporation with a principal place of business at 1022 East Devin Avenue, Bartlett, Illinois 60103.

2. The Defendant, Town of Chester, Vermont, is a municipal corporation organized under the laws of the State of Vermont.

3. On or about March 3,1998, the Plaintiff, Lakeside Equipment Corp. obtained an Order of Judgment Upon Confirmation of Arbitration of Award against the Defendant Town of Chester in the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, in the amount of $52,695.15 with statutory

judgment interest to accrue on such Judgment from the date of entry until such Judgment is paid in full. An authenticated copy of said Order of Judgment Upon Confirmation of Arbitration Award is attached hereto as Exhibit 1.

4. Said Order of Judgment Upon Confirmation of Arbitration Award remains unpaid and unsatisfied.

WHEREFORE, the Plaintiff, Lakeside Equipment Corp., seeks to domesticate and enforce said Judgment against the Defendant, Town of Chester, Vermont, in the State of Vermont and respectfully requests that this Court grant a Judgment in its favor on said Judgment together with attorney's fees, interest, costs and such other relief as this Court deems just and reasonable.

Dated at Springfield, County of Windsor and State of Vermont this 20th day of March, 1998.

Lakeside Equipment Corp.

BY /s/ Patrick M. Ankuda
Patrick M. Ankuda, Esq.
Parker& Ankuda, P.C.
Attorneys for Plaintiff

Exhibit 1

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

Case No. 98 L-45

Lakeside Equipment Corp

Plaintiff(s)/Petitioner(s)

Town of Chester, Vermont

Defendant(s)/Respondent(s)

AUTHENTICATION UNDER ACT OF CONGRESS
28 USCA 115/1739

CLERK'S CERTIFICATE

I, DEBORAH SEYLLER, DO HEREBY CERTIFY that I am the Clerk of the Circuit Court for the 16th Judicial Circuit, County of Kane and State of Illinois, and that as such Clerk I am the Keeper and Custodian of the files and records of said Circuit Court and the Seal thereof.

I DO FURTHER CERTIFY that the above and foregoing is a full, true and complete copy of

Order of Judgment upon Confirmation of Arbitration Award, entered March 3, 1998

Order Confirming Arbitration Award, entered March 3, 1998

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the Circuit Court for the 16th Judicial Circuit, County of Kane and State of Illinois, at my office in the City of Geneva, in said Kane County, Illinois this 5th day of March, 1998.

/s/ Deborah Seyller
Clerk of the Circuit Court for the 16th Judicial Circuit

JUDGE'S CERTIFICATE

I, Judge Roger Eichmeier, one of the Judges of the Circuit Court of Kane County, in and for the Sixteenth Judicial Circuit of Illinois, do hereby certify that Deborah Seyller, whose name is subscribed to the Certificate of Attestation contained herein, is now and was at the time of signing and sealing the same the duly elected, acting and qualified Clerk of the Circuit Court of Kane County, Illinois; and, that full faith and credit are and of right ought to be given to all of her official acts as such Clerk in all Courts of Record and elsewhere; that her attestation herein above is in due form of law and by the proper officer.

Given under my hand this 5th day of March, 1998.

/s/ Roger Eichmeier

CLERK'S CERTIFICATE

I, DEBORAH SEYLLER, Clerk of the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois, do hereby certify that Judge Roger Eichmeier, whose signature appears m the foregoing certificate was at the time of signing the same one of the Judges of said Court and was duly commissioned and qualified, that full faith and credit are and of right ought to be given to all of his official acts, as such, in all Courts of Record and elsewhere.

IN TESTIMONY WHEREOF. I have hereunto set my hand and affixed the seal of said Court at Geneva, Illinois, this 5th day of March, 1998.

/s/ Deborah Seyller
Clerk of the Circuit Court for the 16th Judicial Circuit

IN THE CIRCUIT COURT FOR THE SIXTEENTH JUDICIAL CIRCUIT KANE COUNTY, ILLINOIS

General No. L KA 98 0045

LAKESIDE EQUIPMENT CORPORATION,
a Delaware Corporation,
Plaintiff,

vs.

TOWN OF CHESTER, VERMONT,
Defendant.

ORDER OF JUDGMENT UPON CONFIRMATION OF ARBITRATION AWARD

THIS CAUSE coming on the PETITION FOR CONFIRMATION OF ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT ON AWARD by the Plaintiff, LAKESIDE EQUIPMENT CORPORATION, a Delaware Corporation ("Lakeside"), by and through its attorneys, GROMER & WITTENSTROM, P.C., and against the Defendant, the TOWN OF CHESTER, VERMONT ("Chester"), made pursuant to the contract between the parties and pursuant to the Uniform Arbitration Act, 710 ILCS 5/1,

IT IS THE FINDING OP THIS COURT THAT:

1. This Court having confirmed the Arbitration Award by separate Order of this date, pursuant to the Act, the Act then requires, under 710 ILCS 5/14, entitled "Judgment on award", that:

> "Upon the granting of an order confirming, modifying or correcting an award, judgment shall be entered in conformity therewith and be enforced as any other judgment. Costs of the application and of the proceedings thereto, and disbursements may be awarded by the court as to the court seems just.";

2. The Arbitration Award of August 25, 1997, additionally states that:

> "The administrative fees and expenses of the American Arbitration Association (hereinafter "AAA") totaling SEVEN HUNDRED FIFTY DOLLARS AND NO CENTS ($750.00) shall be borne equally. Therefore, Respondent (Town of Chester) shall pay to Claimant (Lakeside Equipment Corporation) THREE HUNDRED SEVENTY FIVE DOLLARS AND NO CENTS ($375.00)",

upon which no payment has been received, according to Plaintiffs verified petition;

3. Also, pursuant to such verified petition, Plaintiff has incurring additional court costs pursuant to the filing of this action, plus additional attorneys fees since the date of the hearing, as submitted in the affidavit and itemized statement of Plaintiffs counsel Eric M. Johnson, of Gromer & Wittenstrom, P.C., which

additional fees and costs are authorized under the contract between the parties; and

4. Service having been had by registered mail pursuant to contract as allowed under the Act;

NOW, THEREFORE, IT IS HEREBY ORDERED that the Award of the Arbitration having just been confirmed by separate Order of this date, judgment is entered in favor of Plaintiff LAKESIDE EQUIPMENT CORPORATION, and against Defendant TOWN OF CHESTER, VERMONT, in the amount of $50,890.06, plus additional fees and costs to date of:

Additional reimbursement due from Defendant to Plaintiff for Arbitration adminstration fees Per Paragraph 3 of the award $375.00

Additional Attorneys fees, and cash advances by attorneys including postage of $6.09 and filing fees of $198.00 per Attorney Statements dated 11/8/97, 2/6/98 and 3/2/98 $1,430.09

for a total judgment amount of $52,695.15,

with statutory judgment interest to accrue on such judgment from the date of entry until such judgment is paid in full.

Date: March 3, 1998

Enter: /s/ Roger Eichmeier
Judge

Prepared by:
Eric M. Johnson
GROMER & WITTENSTROM, P.C.
Attorneys at Law
75 Market Street, Suite 1
Elgin, Illinois 60123
Telephone: (847)741-6700
Facsimile: (847)741-6702

American Arbitration Association

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
Re: 51 E 199 00382 96
Lakeside Equipment corporation
and
Town of Chester, Vermont

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated April 23, 1996, aid having been duly sworn and having duly heard the proofs and allegations of the Lakeside Equipment Corporation, and Town of Chester, Vermont laving failed to appear after due notice by mail in accordance with the Commercial Arbitration Rules of the American Arbitration Association, hereby, AWRED AS FOLLOWS:

1. Town of Chester, Vermont (hereinafter "Respondent") shall pay to Lakeside Equipment Corporation (hereinafter "Claimant") the sum of FIFTY THOUAND EIGHT HUNDRED NINETY DOLLARS AND SIX CENTS ($50,890.06) .

2. The administrative fees and expanses of the American Arbitration Association (hereinafter "AAA") totaling SEVIN HUNDRED FIFTY DOLLARS AND NO CENTS ($750.00) shall be borne equally. Therefore, Respondent shall pay to Claimant THREE HUNDRED SEVENTY FIVE DOLLARS AND NO CENTS ($375.00).

3. The compensation of the arbitrator totaling ONE THOUSAND FIVE HUNDRED DOLLARS AND NO CENTS ($1,500.00) shall be borne equally. Said amounts having been paid, no further amounts are due for arbitrator's compensation.

4. This Award is in full settlement of all claims submitted to this arbitration.

DATED: August 25, 1997

SIGNED: /s/ Donald E. Casey
Donald E. Casey, Esq.

[TOWN SEAL] [TOWN SEAL]

TOWN OF CHESTER

February 16, 1996

Mr. Dennis Bryer, P.E.
Environmental Engineer
State Agency of Natural Resources
Wastewater Management Division
103 South Main Street
Sewing Building
Waterbury, VT 05671-0405

Dear Dennis:

The following is in response to your letter of January 23:

Schedule of Necessary Improvements

1996 - Refurbish one clarifier
Construct cover around clarifier
1997 - Refurbish one clarifier
1998 - Construct emergency storage tank
1999 - Construct additional sludge holding tank

Source of Income

The Town has included in its 1996 Budget $9,100 for capital improvements. In the event the costs should exceed that amount, there is $21,000 available in the servicing fund.

The proposed necessary improvements will be budgeted as capital expenditures for the following three years.

Our goal is to have the plant totally upgraded by 1999, and a suitable servicing fund established subsequent to that to allow for necessary repairs without increasing the sewer fees.

Please let me know if you need further information.

Sincerely,

/s/ Susan S. Spaulding
Susan S. Spaulding
Town Manager
sss:gae

P. O. Box 370,
Chester, Vermont 05143
Telephone 802-875-2173
Fax 802-875-2237

Ex 15 Admitted
Plaintiff's Exhibit 6
7-3-02 T. Violette

April 23, 1996

Town Of Chester
P.O. Box 370
Chester, VT 05143

Attention: David Duquette

Subject: CHESTER, VT
SO#96-1137
2-17' DIA. YEOMAN CLARIFIERS

Dear David:

This is to thank you and confirm that we have entered your verbal order for the following parts:

1) 2 Drive Assembly
$9982.00

2) 2 Sludge Scraper Assembly per Drawing D-46031 17' Dia Clarifier
10384.00

3) 1 D-35720 17' Dia Alum. Skirt Assembly CW x 6'-10" Deep with Hanger Brackets
5290.00

4) 1 D-35721 17' Dia Alum. Skirt Assembly CCW x 6'-10" Deep with Hanger Brackets
5290.00

5) 2 9'-0" Round Weir Trough w/Steel Weir Plates per Drawing D-52635
9146.00

Total Cost $ 40,092.00

The above prices are f.o.b. factory with freight allowed to the job site. Terms of payment are net 30 days from date of shipment and the Conditions of Sale are in accordance with GIL-93, copy attached. Shipment is scheduled for the week of 06/10/96.

Enclosed are two sets of drawings. Check them over and let us know if everything looks okay. We feel that the grout at the lower anchor bolts should be removed and replaced after installation of new parts.

If your plant does septage handling or has problems with bar screens you might be interested in a new piece of equipment that we manufacture, called a Rotamat. We have enclosed an information sheet for your review.

If you have any questions, please do not hesitate to contact us or our local representative whose address and phone number are listed below.

Very truly yours,
Walter HcBride, III
WM:bm

Enclosures: Micro Strainer
Sludge Acceptance Plant
Fine Screen
GIL-93

cc: WWK
The Maher Corporation
71 Concord Street
P.O. Box 127
North Reading, MA 01864
617-933-3210

GIL-93
(REPLACEMENT PARTS)

CONDITIONS OF SALE

THIS QUOTATION IS SUBJECT TO THE FOLLOWING CONDITIONS OF SALE

You are hereby notified that unless we receive notice (as a part of your purchase order, or in a separate writing, if acceptance is oral) of your rejection of any of these conditions, these conditions shall become a part of the agreement between us. Acceptance is good only when received by us at our offices in Bartlett, Illinois.

* * *

TERMS: Net due thirty (30) days after date of shipment. Any balance remaining due thirty-one (31) days beyond the shipment date will be subject to a monthly service charge of two percent (2%) per month on the unpaid balance until paid. Should we have to engage an attorney to collect the balance due us, including the service fee, you agree to reimburse us for all collection costs including reasonable attorney fees.

* * *

CONTRACT: We both agree that this Contract contains the complete and final agreement between us, and may not be modified, supplemented, explained, or waived by oral evidence, your purchase order, course of dealing, or in any other way, except where made in a writing, signed by you and your company's authorized

officer, and attached hereto. All terms herein employed shall have the same definition as set forth in the Uniform Commercial Code in effect in the State of Illinois, under the Illinois Revised Statutes, Chapter 26, Paragraphs 1-101 et seq., on the date of execution of this agreement.

* * *

ARBITRATION: Any controversy or claim arising out of or relating to this contract, or any modification thereof, shall be settled in Kane County, Illinois, by Arbitration in accordance with the laws of the State of Illinois, and the current Rules of the American Arbitration Association, and the parties consent jurisdiction of the Circuit Court for the 16th Judicial Circuit, Kane County, State of Illinois, and further consent that any process or notice of motion or other application to such Court or a judge thereof may be served outside the State of Illinois by registered mail or by personal service, provided a reasonable time for appearance is allowed. Judgement [sic] upon the award rendered by the Arbitrator may be entered in any court having jurisdiction hereof, which shall include the county of arbitration.

* * *

EXCERPTS, TOWN OF CHESTER 1995 ANNUAL REPORT

* * *

REPORT OF THE TOWN MANAGER

* * *

The Wastewater Treatment Plant is operating well under the supervision of Dave Duquette. The aeration system installed the previous summer has shown significant savings in electrical costs. He has also upgraded the ultraviolet light system and will begin upgrading the clarifiers this summer. By the turn of the century, we plan to have the entire plant upgraded and the bonds retired.

* * *

SEWER DEPARTMENT
STATEMENT OF REVENUES AND EXPENDITURES
Year Ending December 31, 1995

* * *

BALANCE SHEET

ASSETS	1995	1994

* * *

VT National Sinking Fund	$21,392.58	$21,265.08

* * *

1996 BUDGET - SEWER DEPARTMENT

SEWER DEPARTMENT EXPENDITURES

1994 Expend	1995 Budget	1995 Expend	1996 Budget
	* * *		
[Cptl Imprv]			
$104,827.47	$0.00	$0.00	$9,100.00

* * *

EXCERPTS, TOWN OF CHESTER 1994 ANNUAL REPORT

* * *

REPORT OF THE BOARD OF SELECTMEN

* * *

One of the most difficult projects facing the Board in their guise as Sewer Commissioners was the Wastewater Treatment Plant. The State required its upgrade with unalterable time limits. Unfortunately, the Texas firm hired to provide the design and construction of a new aeration system could not produce a system acceptable to the State. They then proceeded to sue us in Texas for not paying for the unacceptable system. We did prevail in the suit, but had to hurry to get an acceptable system in place. The costs of the system was [sic] much more than budgeted and put the Fund in a tight bind. It is our intent to get through the next few years with a very "bare bones" budget and build up our reserves so that the other 25 year old parts that will need replacing can be replaced without increasing the rates any more.

* * *

REPORT OF THE TOWN MANAGER

During 1994 the Wastewater Treatment Plant saw major repairs as ordained by the State. The Plant is over 25 years old and these were necessary repairs. They will improve our efficiency and hopefully reduce

the costs of operation. There are other replacement parts that will be necessary, but it is our intent to develop sinking funds to make those repairs so that rates will not be affected.

* * *

SEWER DEPARTMENT
STATEMENT OF REVENUES AND EXPENDITURES
Year Ending December 31, 1994

* * *

Excess of Expenses over Revenues	-$62,981.81

BALANCE SHEET

ASSETS	1994	1993
	* * *	
VT National Sinking Fund	$21,265.08	$59,576.57

* * *

1995 BUDGET - SEWER DEPARTMENT

SEWER DEPARTMENT EXPENDITURES

1993 Expend	1994 Budget	1994 Expend	1995 Budget
	* * *		
[Cptl Imprv]			
$20,000.00	$33,000.00	$104,827.47	$ 0.00
	* * *		

SEWER DEPARTMENT REVENUES

SwrFees			
$92,018.37	$110,750.00	$124,049.37	$115,000.00

[LAKESIDE LOGO] WATER PURIFICATION EQUIPMENT SINCE 1928

LAKESIDE EQUIPMENT CORPORATION
1022 E. DEVON AVE. ■ P.O. BOX 8448

BARTLETT, IL 60103 ■ 708/837-5640

INTEROFFICE CORRESPONDENCE

July 7, 1994

To: Lakeside Staff

Subject: Chester, VT
Courtesy Visit
17' Clow Clarifier - Similar to LEC
Spiraflo Clarifier
Service July 1, 1994

Gentlemen:

Stopped by the plan at the request of the plant operator, per Lakeside's Wally McBride, to assess parts requirements to recondition 17' Clow Clarifier.

Personnel present:

Dave Duquette, Plant Operator, City of Chester
Plant phone #802-875-4325

ONE 17' CLOW CLARIFIER

This unit has been in service since 1971. There are two units. Mr. Duquette just wants prices on the one C. W. unit.

The tanks could not be dewatered at this time. He is interested in a budget price for the coming year on the following items.

1. Skirts and support channel, top and bottom.

2. New wall supports and hangers.

3. New weirs.

4. Scraper arms and squeegees.

5. Drive shaft.

6. Drive - Lakeside's standard for this size clarifier. The existing drive has no I.D. plate on it. However, the output shaft of the reducer drives a pinion which drives a spur gear keyed to the drive shaft.

I left the site at this time.

Submitted by:

/s/ Frank R. Tatarek
Frank R. Tatarek
FRT/bm

cc: The Maher Corp.

bcc: Wally McBride - Please work up a budget price for items we found to require replacement.

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES
As Amended and Effective on July 1, 1996

* * *

COMMERCIAL ARBITRATION RULES

* * *

1. Agreement of Parties

The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter "AAA") or under its Commercial Arbitration Rules. These rules and any amendment of them shall apply in the form obtained at the time the demand for arbitration or submission agreement is received by the AAA.

* * *

6. Initiation under an Arbitration

Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

a. the initiating party (hereafter claimant) shall, within the time period, if any, specified in the contract(s), give written notice to the other party (hereinafter respondent) of its intention to arbitrate (demand), which notice shall contain a statement setting forth the nature of the dispute, the amount

involved, if any, the remedy sought, and hearing locale requested, and

b. shall file at any regional office of the AAA three copies of the notice and three copies of the arbitration provisions of the contract, together with the appropriate filing fee.

The AAA shall give notice of such filing to the respondent or respondents. A respondent may file an answering statement in duplicate with the AAA within ten days after notice from the AAA, in which event the respondent shall at the same time send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the appropriate fee provided in the schedule on page 27 shall be forwarded to the AAA with the answering statement. If no answering statement is filed within the stated time, it will be treated as a denial of the claim. Failure to file an answering statement shall not operate to delay the arbitration.

* * *

21. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The AAA shall send a notice of hearing to the parties at least ten days in advance of the hearing date, unless otherwise agreed by the parties.

* * *

30. Arbitration

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party.

* * *

47. Applications

Parties to these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

* * *

51. Deposits

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

* * *

(2)

No. 04-1280

Supreme Court, U.S.
FILED
APR 2 5 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

LAKESIDE EQUIPMENT CORPORATION,
A DELAWARE CORPORATION,

Petitioner,

v.

THE TOWN OF CHESTER, A VERMONT
MUNICIPAL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Vermont

BRIEF OF THE TOWN OF CHESTER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

JAMES F. CARROLL
Counsel of Record
ENGLISH, CARROLL & RITTER, P.C.
64 Court Street
Middlebury, VT 05753
(802) 388-6711

Counsel for Town of Chester

April 25, 2005

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Has Petitioner established a compelling reason for certiorari review where the underlying case was decided using well established due process precedent and a fact specific application of state municipal agency law for which there exists no conflicting decisions amongst state courts of last resort or United States courts of appeal?

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D.S.Am. (East) v. Elmendorf Grafica, 274 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472 (1995) 11, 12

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of the following constitutional and statutory provisions:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S.Const., Amend. XIV §1.

> (a) Any person, whether or not a citizen or resident of this State, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits such person, and, if an individual, his or her personal representative, to the jurisdiction of the courts of this State as to any cause of action arising from the doing of any such acts:
>
> (7) the making or performance of any contract or promise substantially connected with this State. . . .
>
> (c) A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States.

735 I.L.C.S. 5/2 – 209(a)(7) and (c).

STATEMENT OF THE CASE

A. Factual Background

This case involves Petitioner Lakeside Equipment Corporation's efforts to domesticate an Illinois judgment in Vermont. This judgment was issued without the requisite minimal contacts necessary to satisfy the requirements of due process under the Fourteenth Amendment of the United States Constitution and in derogation of "traditional notions of fair play and substantial justice." *International Shoe Company v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed 95 (1945).

Lakeside Equipment Corporation (hereinafter "Lakeside") is a Delaware corporation with its principal place of business in Bartlett, Illinois. Petitioner's Appendix (hereinafter referred to as "APP") at 67. Lakeside designs, fabricates and delivers equipment for wastewater treatment plants. APP 38.

The Town of Chester (hereinafter "Chester" or "Town") is a municipal corporation organized under the laws of the State of Vermont. APP 6-7. Chester is governed by its Board of Selectmen which has "general supervision of the affairs of the town" and the duty to perform "all duties required of towns . . . not committed by law to the care of any particular officer." 24 V.S.A. §872; APP 11.

Susan Spaulding is Chester's Town Manager and Chief Purchasing Agent. 24 V.S.A. §1236(3); APP 11. As Town Manager, Spaulding oversees the Wastewater Treatment Department. APP 11. Each department prepares and submits an annual budget to Spaulding and the Selectboard for approval, which is then submitted to the voters for approval at its annual town meeting. APP 11.

Once approved, the Selectboard and Town Manager are authorized to make purchases within the annual budget. APP 11. In Chester, department heads are generally authorized, by unwritten policy, to make purchases within their respective budgets, including capital improvements, without prior approval of the Town Manager or the Selectboard up to $500.00. APP 11. Purchases exceeding $500.00 require the prior approval of the Town Manager. APP 11-12. Upon approval, a purchase order number is issued by the Town Manager in chronological order. APP 12.

Chester owns and operates a wastewater treatment plant. APP 11. David Duquette ("Duquette") was hired by Chester to operate the wastewater treatment plant in 1994. APP 13. From 1994 through 1996, Chester conducted a 20 year review of its wastewater treatment system with the aid of a local consulting engineer. APP 12. The engineer prepared and filed a report with the state regulatory agency which contained an evaluation of the plant and recommended improvements, including the purchase of replacement *parts* for a clarifier. APP 12. Chester began the process of obtaining quotes from equipment suppliers in order to identify the amount of funds necessary to effectuate repairs. APP 12-13.

Duquette assisted Chester's engineer in the preparation of the report and assessment of the treatment plant. APP 12-13. He also solicited numerous estimates from manufacturers, including Lakeside, to repair or replace parts at the treatment plant. APP 13. In March of 1996, the voters of Chester approved, for the 1996-1997 fiscal year, limited capital expenditures for the wastewater treatment plant in the amount of $9,100.00. APP 13. Despite this limited budgeting authority, and a specific

expense limitation of $300.00 previously placed on Duquette by Spaulding, Duquette placed a verbal order with Lakeside for two new replacement clarifiers totaling $40,092.00. APP 13. Duquette placed the order without informing Spaulding and without securing her approval as Chester's purchasing agent.[1]

On April 23, 1996, Lakeside itemized and confirmed the order in a letter to Duquette. APP 13, 80-82. Accompanying the letter was a document entitled "Conditions of Sale" which called for payment within 30 days, and "arbitration of any controversy or claim arising out of or relating to this contract." APP 83-84. This was the first and only order Lakeside ever received from Chester. APP 14. The equipment was delivered directly to Chester's wastewater treatment plant on June 24, 1996, and accepted by Duquette. APP 15. No approval for this order was ever obtained by Duquette and no purchase order was ever issued by Chester for the order. APP 15.

Spaulding's first knowledge of the purchase was in late July, 1996 after receipt of Lakeside's bill. APP 13-14. Lakeside contacted Spaulding in late July seeking payment at which point Spaulding indicated that payment would be made within a week. APP 2. On August 1, 1996, after examining the bill and meeting with the Selectboard,

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[1] Duquette testified that Spaulding was informed of the Lakeside purchase and had authorized placement of the order. APP 14. Spaulding testified that she had never authorized or been informed of the purchase or the placement of the order by Duquette and further denied ever issuing a purchase order for that purpose. APP 14. Judge Cooke, sitting in the Windsor Superior Court, specifically found Spaulding's testimony to be credible. APP 14-15.

Spaulding sent written notification to Lakeside that Duquette had no authority to make the purchase and that the Selectboard was withholding approval for payment. APP 2 and 14; Chester Appendix at 1. On August 27, 1996, Spaulding confirmed with Lakeside that Chester would not purchase the materials. Chester Appendix at 2. The clarifiers have not been used by Chester and Lakeside refuses to take them back. APP 2.

In his communications with Chester, Mr. McBride, Lakeside's sales agent, dealt exclusively with Mr. Duquette. APP 64-66. Lakeside made no independent inquiry of Chester or any of its agents concerning Duquette. APP 15. Lakeside did not inquire as to Duquette's authority to make purchases or order capital equipment. APP 15. Nor did Lakeside verify Duquette's authority to place an order of this magnitude. APP 15. No Town officer ever confirmed with Lakeside that Duquette had authority to place the order in question, nor did any Town officer ratify the purchase after delivery. APP 15.

B. Procedural Background

In November of 1996, Lakeside submitted its demand for payment to arbitration with the American Arbitration Association ("AAA"). APP 23. This submittal was, presumably, undertaken pursuant to the arbitration clause found in the Conditions of Sale attached to Lakeside's correspondence of April 23, 1996. APP 23. AAA acknowledged receipt of the demand for arbitration and informed Chester of the requested hearing locale in Chicago, Illinois. APP 23. Chester did not respond to AAA's notification or file any appearance, pleadings, briefs or other documents. APP 23. Chester did not attend or participate in a

June 24, 1997 hearing held before the arbitrator in Chicago. APP 23. On being billed, Chester did pay a fee assessed by the arbitrator. APP 23. Chester paid no other filing fees, expenses or costs. APP 77.

At the June 24, 1997 hearing, the arbitrator requested that the parties submit briefs regarding jurisdiction. Lakeside submitted a brief but Chester did not. APP 23. On August 25, 1997, the arbitrator issued an award in favor of Lakeside in the amount of $50,890.06. APP 23 and 76. Subsequently, Lakeside petitioned for confirmation of the arbitration award in the Illinois Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois. APP 59. Chester did not respond to Lakeside's petition, nor did it appear in the Illinois Court proceeding. APP 23. On March 3, 1998, the Kane County Circuit Court issued its order granting Lakeside's Petition against the Town and entering judgment against Chester in the amount of $52,695.15. APP 23 and 74.

On March 31, 1998, Lakeside filed its Complaint to Domesticate and Enforce Foreign Judgment in the Windsor County Superior Court in the State of Vermont. APP 23 and 67. Chester filed its appearance and an answer and asserted a counterclaim challenging the validity of the underlying contract and the jurisdiction of the Illinois court to issue judgment. APP 23-24. The Windsor Superior Court granted summary judgment in favor of Lakeside, which was appealed to the Vermont Supreme Court. APP 36-58.

In *Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 795 A.2d 1174 (2002) (hereinafter "*Lakeside I*"), the Vermont Supreme Court determined that Chester had not "waived its right to raise the jurisdictional issue in this proceeding to domesticate the Illinois judgment." *Lakeside*

I, 173 Vt. at 321, 795 A.2d at 1178; APP 25. The Court further found that Chester had not appeared in the Illinois proceeding and confirmed that a defendant "may defeat enforcement of [a] judgment in another forum by showing that the judgment was issued by a court lacking personal jurisdiction." *Id.* The Vermont Supreme Court then considered "whether the contacts made by the plant operator can be attributed to the Town so as to impose personal jurisdiction over the Town and otherwise bind the Town." *Lakeside I*, 173 Vt. at 322, 795 A.2d at 1179; APP 27. After finding an inadequate record on the issue, the Vermont Supreme Court reversed and remanded the case to determine whether there existed actual or apparent authority for Duquette's actions which were imputable to Chester or whether there was evidence establishing that Chester had ratified Lakeside's contract. *Lakeside I*, 173 Vt. at 326, 795 A.2d at 1182; APP 33.

On remand, the Windsor Superior Court took two days of testimony and issued its Findings, Opinion and Order concluding as follows:

> Judgment is for the Defendant, Town of Chester. The Court DECLARES that there never was a contract between Lakeside Equipment Corp. and the Town of Chester. The Court declines to enforce the judgment from the State of Illinois, based on lack of personal jurisdiction.

APP 10 and 19-20. Lakeside then appealed to the Vermont Supreme Court which unanimously affirmed the Windsor Superior Court's issuance of judgment in favor of Chester. APP 8. Lakeside filed its Motion to Reargue on October 1, 2004, which was denied by Entry Order entered December

16, 2004. APP 62. Petitioner's Writ of Certiorari was then filed on March 14, 2005, and placed on this Court's docket on March 24, 2005.

SUMMARY OF ARGUMENT FOR DENYING THE PETITION

Lakeside's Petition for Writ of Certiorari fails to set forth any compelling reasons upon which this Court should grant certiorari under U.S. Sup. Ct. Rule 10 or 28 U.S.C. §1257(a). In summary, certiorari review of this case is not warranted because: (a) the Vermont Supreme Court used longstanding due process precedent in finding that Illinois lacked personal jurisdiction over Chester; (b) the decision that Chester lacked sufficient contacts with Illinois to assert personal jurisdiction was necessarily based upon the application of unique facts to state municipal agency law for which there exists no dispute among circuit courts of appeal or state courts of last resort, and (c) Lakeside's argument that Chester accepted or consented to jurisdiction in Illinois was not properly preserved for appeal.

ARGUMENT

There is little about this case, or how it came to be resolved, that could form the basis of an opinion on personal jurisdiction having broad application among federal or state courts. There is nothing about this case which presents a compelling reason to grant certiorari review given its unique factual underpinnings and the use

of broadly accepted federal legal principles established in *International Shoe Company v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). Lakeside's Petition does not attempt to articulate why this Court is compelled to accept certiorari review. Instead, Lakeside has chosen to argue its belief that the Vermont Supreme Court has misapplied the facts to broad agency concepts. This approach is directly at odds with the admonition found in Rule 10 of the Supreme Court Rules, which states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Lakeside articulates two substantive reasons for granting certiorari review: First, it argues that Lakeside "accepted and waived objections to personal jurisdiction in Illinois" and ratified the underlying contract when it paid a fee assessed by an arbitrator sitting in Illinois. *Lakeside Petition* at 10-18. Second, Lakeside argues that the Vermont courts misapplied well established "principles of agency law" when it found that Duquette, Chester's sewer plant operator, did not possess the requisite apparent authority to contract with Lakeside on Chester's behalf. *Lakeside Petition* at 18-24. For the reasons stated below, neither reason justifies certiorari review.

A. The Vermont Supreme Court Applied this Court's Controlling Precedent in Determining that Chester Lacked the Minimum Contacts Necessary to Confer Personal Jurisdiction in Illinois

Before addressing the substance of Lakeside's claimed errors, it is important to note that the Vermont Supreme

Court referenced and applied this Court's longstanding precedent in deciding that the Illinois judgment was not entitled to full faith and credit. While Lakeside chooses to label the case as a "transparent effort" to "circumvent the core constitutional requirement of full faith and credit," *Lakeside Petition* at 11, it is readily apparent from the Vermont Supreme Court's decisions that it gave effect to both the Full Faith and Credit and the Due Process Clauses of the United States Constitution by using the framework established by this Court in resolving the merits of the case.[2]

In *Lakeside Equipment Corp. v. Town of Chester*, 173 Vt. 317, 795 A.2d 1174 (2002) (hereinafter referred to as "*Lakeside I*"), the Vermont Supreme Court confirmed that "[a] sister-state judgment is normally 'entitled to full faith and credit in the absence of a showing that [the] court lacked jurisdiction or acted to deprive defendant of a reasonable opportunity to be heard.'" *Lakeside I*, 173 Vt. at 321, 795 A.2d at 1178 (citing *Cook v. Cook*, 342 U.S. 126,

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[2] Lakeside has never attempted to establish personal jurisdiction by arguing that the Illinois courts enjoy a "general" as opposed to "specific" jurisdiction over Chester by virtue of Chester's general business contacts with Illinois. *See Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir. 1996) (distinguishing jurisdictional analysis between "general" and "specific" jurisdiction). In fact, there is no evidence suggesting that Chester had any continuous or systematic general business contacts with Illinois entities. *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416, 104 S.Ct. 1868, 1873, 80 L.Ed.2d 404 (1984). The focus of Lakeside's argument has always been limited to Duquette's specific contacts with Lakeside which resulted in Lakeside's shipment of clarifiers to Chester and its subsequent efforts to collect. Chester APP 14-16. Accordingly, the Vermont Supreme Court properly focused on Chester's specific contacts with Lakeside in determining whether personal jurisdiction was established. *Lakeside I*, 173 Vt. 317, 323, 795 A.2d at 1180.

128, 72 S.Ct. 157, 96 L.Ed. 146 (1951)). The Vermont Supreme Court also acknowledged that "'in determining jurisdiction, the foreign State's law, as limited by due process, controls.'" *Lakeside I*, 173 Vt. at 322, 795 A.2d at 1189 (citing *Pavey Envelope & Tag Corp. v. Diamond Envelope Corp.*, 271 Ill.App.3d 808, 208 Ill.Dec. 193, 648 N.E.2d 1115, 1117 (1995)).

The Vermont Supreme Court went on to acknowledge the Illinois long-arm statute, *see* 735 I.L.C.S. 5/2 – 209(a)(7) and (c), and determined that the Illinois courts are statutorily authorized to exercise jurisdiction "on any . . . basis permitted under the Constitutions of Illinois and the United States." *Lakeside I*, 173 Vt. at 323, 795 A.2d at 1179. "[T]he question becomes whether the Court's exercise of jurisdiction comports with federal due process." *Id.* (citing *D.S.Am. (East) v. Elmendorf Grafica*, 274 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472, 478 (1995)).

After determining that Chester had not waived its right to raise a jurisdictional defense due to its non-appearance in Illinois, *Lakeside I*, 173 Vt. at 321-322, 795 A.2d at 1178-1179, the Vermont Supreme Court then engaged in the federal due process analysis articulated by the Illinois Supreme Court in *Elmendorf Grafica*.[3]

> Federal due process is satisfied when the defendant's contacts with the foreign state make it reasonable for the defendant to anticipate being

[3] The two tiered approach of reviewing a state's statutory authority pursuant to its long-arm statute before embarking on the due process analysis is entirely consistent with the approach taken within the State of Illinois. *See Purdue Research Foundation v. Sanofi-Synthelabo*, 338 F.3d 773, 779 (7th Cir. 2003) and *D.S.Am. (East) v. Elemendorf Grafica*, 247 Ill.App.3d 643, 211 Ill.Dec. 10, 654 N.E.2d 472, 478 (1995).

> hauled into court in that jurisdiction. The principle factors to be considered are (1) whether the nonresident defendant has had minimum contacts with the forum state so that there was fair warning that the defendant might have to defend a lawsuit there; (2) whether the action arose out of the defendant's contacts with the forum state; and (3) whether it is reasonable for the defendant to litigate in the forum state.

Lakeside I, 173 Vt. at 323, 795 A.2d at 1179 (citing *Elemendorf Grafica*, 654 N.E.2d 472, 478 (1995)). The Vermont Supreme Court acknowledged that in Illinois "a single business transaction may constitute sufficient minimum contacts to confer personal jurisdiction over a non-resident defendant." *Id.* (citing, *Allerion, Inc. v. Nueva Icacos, S.A. de C.V.*, 283 Ill.App.3d 40, 218 Ill.Dec. 632, 669 N.E.2d 1158, 1163-64 (1996)). "Under this analysis, the exercise of personal jurisdiction over a nonresident buyer is justified where the buyer initiated a transaction calling for specially ordered merchandise." *Id.* Finally, the Vermont Supreme Court acknowledged that "'[t]he due process clause permits personal jurisdiction to be exercised over a defendant based upon acts of its agent.'" *Id.* at 324. The ultimate question, however, as framed in *Lakeside I*, was whether Duquette's contacts with Lakeside may be imputed to the Town pursuant to his apparent authority.[4] *Lakeside I*, 173 Vt. at 324, 795 A.2d at 1180.

Lakeside has not challenged the Vermont Supreme Court's use of the above cited precedent or its analytical

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[4] Lakeside has not disputed that Duquette did not have actual authority to enter into the contract. *Lakeside I*, 173 Vt. at 324-325, 795 A.2d at 1180.

framework. Nor has it challenged the proposition that an assessment of specific jurisdiction in this case requires a determination of "whether Duquette's conduct in ordering $40,000.00 in equipment from Lakeside may be imputed to the Town." *Lakeside I*, 173 Vt. at 324, 795 A.2d at 1180. Indeed, similar imputation issues have moved Illinois federal courts to undergo a similar analysis to the same effect. *See Purdue Research Foundation v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 784-785 (7th Cir. 2003) (holding that conduct of assignor, given the facts, could not be imputed to assignee for purposes of establishing personal jurisdiction over assignee). Instead, Lakeside chooses to attack the Vermont courts' findings and conclusions on the agency issue.

B. The Vermont Supreme Court's Determination that Illinois Lacked Personal Jurisdiction was Based Upon Unique Facts as Applied to State Municipal Agency Law for Which There is no Dispute Among Circuit Courts of Appeal or State Courts of Last Resort

Lakeside seeks a reversal of the Vermont courts' substantive determination that Duquette, as Chester's sewer plant operator, had no apparent authority to contract with Lakeside and thereby establish the requisite contact necessary for jurisdiction. In doing so, it urges on this Court a re-working of the facts and the adoption of erroneous legal agency standards.

1. Vermont courts properly applied principles of municipal agency law to the unique facts of this case in determining that Duquette's contacts with Lakeside could not be imputed to Chester

The Vermont Supreme court properly remanded this matter in *Lakeside I* for an assessment of the material issues concerning Mr. Duquette's authority and ability to contract on behalf of the Town of Chester. APP 10-20. After assessing the documented evidence presented to it and assessing the credibility of the witnesses at trial, Judge Cook, sitting in the Windsor Superior Court, clearly and affirmatively determined that the facts presented by Lakeside and Chester did not warrant imputation of Duquette's actions to Chester under theories of either actual, implied or apparent authority. APP 16-17. "The deficiency in Lakeside's argument is that it ignores the trial court's unchallenged findings supporting the conclusion that neither Spaulding nor any other town official authorized Duquette to purchase the clarifiers." *Lakeside Equipment Corp. v. Town of Chester*, 2004 Vt. 84, ¶5, 865 A.2d 422, 425 (2004) (hereinafter "*Lakeside II*").

Lakeside now persists in its argument that *apparent* authority was conferred upon Duquette as a result of his activities in upgrading the treatment facility. *Lakeside Petition* at 22-24. In Lakeside's effort to give legal significance to its version of the facts, it cites *Restatement (Second) of Agency*, §27 (1958) as the legal benchmark for determinations of apparent authority. *See Lakeside Petition* at 20.

In making this substantive argument, Lakeside asks this Court to utilize legal standards in a manner which is inconsistent with municipal agency law currently employed in the states of Illinois and Vermont. As accurately stated in *Lakeside I*, the perimeters of agency law "'are sharply circumscribed when the principal is a municipal corporation.'" *Lakeside I*, 173 Vt. at 325, 795 A.2d at 1181 (citing *City of Norwalk v. Bd. of Labor Rel.*, 206 Conn. 449, 538 A.2d 694, 696 (1998)). "The general rule is that parties who contract with municipal corporations are bound to take notice of the power of a particular person or agency to make the contract." *Id.* (citing 10 *T. Evans & J. O'Gallagher, McQuillen Mun. Corp.* §29.04, at 249 (3d. Ed. 1999)). *See also*, *Sinclair v. Town of Bow*, 125 N.H. 388, 480 A.2d 173, 176 (1984) (rule that anyone dealing with agent of municipality is obligated to ascertain extent of agent's authority effectively excludes municipalities having doctrine of apparent authority applied against them, except to prevent unjust enrichment or manifest injustice). In Vermont, municipal purchasing authority is specifically delegated to the town manager. 24 V.S.A. §1236(3).

These are rules with which Lakeside, a corporation doing business in Illinois, should be familiar. "[U]nder Illinois law, '[i]t is the general rule that when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised, the power must be exercised in the manner stated and not otherwise.'" *Bosco v. Chicago Transit Authority*, 164 F.Supp.2d 1040, 1054 (N.D.Ill. 2001). Further, "'when an employee of a municipal corporation purports to bind the corporation by contract without prior approval, in violation of an applicable statute, such a

contract is utterly void', and not merely voidable." *Id.* (citing *D.C. Consulting Eng'rs, Inc. v. Batavia Park Dist.*, 143 Ill.App.3d 60, 97 Ill.Dec. 341, 492 N.E.2d 1000, 1002 (1986) (holding contract void because park district superintendent was without authority to bind the park district in the absence of prior approval by park district board)). "A purchase order or contract that does not comply with the Illinois Municipal Code 'shall be null and void as to the municipality.'" *McMahon v. City of Chicago*, 339 Ill.App.3d 41, 789 N.E.2d 347, 350, 273 Ill.Dec. 447, 450 (Ill. App. 2003) (citing 65 I.L.C.S. 5/8 – 10-21). "A prospective contractor who deals with a municipal corporation is presumed to know the limitations of the power of the city officials to enter into contracts." *Id.* at 46, 789 N.E.2d at 350. In fact, under Illinois law, a "[p]laintiff's reliance on principals of delegation, apparent authority, implied authority, ratification and agency law is misplaced within the municipal law context." *Id.* at 48, 789 N.E.2d at 352.[5]

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[5] Lakeside also argues that common law principles of equitable estoppel should prevent Chester from denying its obligation to pay under the contract. *See Lakeside Petition* at 24-26. In *Lakeside II*, this claim was specifically resolved contrary to Lakeside's position due to the lack of any evidence of knowledge by Chester of Duquette's purchasing activities. *Lakeside II*, 2004 Vt. 84, ¶8, 865 A.2d 422, 426. Further, a review of applicable Illinois law demonstrates that, similar to the law in Vermont, "ordinary principles of estoppel do not usually apply to public bodies." *Chicago Food Management, Inc. v. City of Chicago*, 163 Ill.App.3d 638, 645, 516 N.E.2d 880, 885, 114 Ill.Dec. 725, 730 (Ill.App. 1987).

> The general rule is that a city cannot be estopped by an act of its agent beyond the authority conferred upon him. It has been stated that anyone dealing with a governmental body takes the risk of having accurately ascertained that he who purports to act for it stays within the bounds of his authority, and that this is so even though the agent himself may have been unaware of the limitations upon his authority.

(Continued on following page)

Contrary to Lakeside's arguments, the Vermont courts properly analyzed the applicable state law on municipal agency to determine that Duquette's conduct in purchasing the clarifiers from Lakeside could not be imputed to Chester. This being the case, the Vermont Supreme Court properly determined that the minimum contacts requisite to the assertion of jurisdiction by the Kane County Circuit Court in Illinois was absent – thereby making its judgment order unenforceable in the State of Vermont.

2. Lakeside cites no cases that are in conflict with the decisions of the Vermont Supreme Court in *Lakeside I* and *Lakeside II*

Chester also notes that Lakeside's Petition completely fails to cite any case law issued by any United States circuit court of appeals or a state court of last resort which conflict with the holdings in *Lakeside I* or *Lakeside II* on the agency issue. In fact, a review of Lakeside's Petition in relation to its arguments on agency fails to disclose a single court citation whatsoever. Instead, Lakeside relies entirely on references to the Vermont Supreme Court's underlying opinions in *Lakeside I* and *Lakeside II* and references to various provisions of the *Restatement (Second) of Agency* (1958) in support of its view that vague and general principles of agency law dictate a contrary result. This view, as explained above, is factually and legally erroneous and is, as demonstrated by the absence of relevant citations, not shared by any other court. Accordingly,

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Id. Accordingly, the Vermont Supreme Court properly applied principles of estoppel in finding in favor of Chester. *Lakeside II*, 204 Vt. 84, ¶8, 865 A.2d 422, 426.

Lakeside has failed to articulate any conflict among courts requiring resolution by certiorari review.

C. Chester did not Consent to Personal Jurisdiction in Illinois and Lakeside did not Preserve this Argument on Appeal

Lakeside's lead argument in its Petition is that "the Town accepted and waived objections to personal jurisdiction, and affirmed the existence of the contract, effecting [sic] ratification, when it submitted to the arbitration tribunal sitting in Illinois." *Lakeside Petition* at 11. In essence, Lakeside argues that Chester's payment to an Illinois arbitrator of his fee constituted an "appearance" which the Vermont Supreme Court "failed to give any legal affect [sic] to." *Lakeside Petition* at 11. As will be demonstrated below, this payment does not warrant the legal effect suggested by Lakeside and it was not, in any event, preserved by Lakeside on appeal.

1. The payment of an arbitration fee is not a consent to jurisdiction in Illinois, nor is it ratification of a contract

Although difficult to divine, it appears that Lakeside is seeking to superimpose the waiver provisions found in F.R.C.P. 12(h) on arbitration proceedings by correlating the payment of an arbitrator's fee to the entry of a general appearance. Factually, this inference is completely at odds with the very specific findings of the Vermont courts that Chester never entered an appearance, raised a defense or made any contact whatsoever with the Illinois courts or other parties relating to the domestication proceeding. APP 23. In fact, the arbitration proceeding itself was

initiated by Lakeside pursuant to an arbitration clause unilaterally imposed in a purchase contract which was never agreed to by any duly authorized agent of Chester. APP 23. The contractual question of whether a matter is jurisdictionally suitable for arbitration is an issue for courts, not the arbitrator. *International Medical Group, Inc. v. AAA*, 312 F.3d 833, 842 (7th Cir. 2002). It is highly questionable that an arbitrator, through his billing practices, can conclusively impose a court's jurisdiction over an unsuspecting litigant even if it were contractually provided by agreement. Here, however, there is nothing in AAA's Rules of Arbitration that suggests the preclusive effect advanced by Lakeside. Chester APP 3.

Lakeside has failed to provide a reference to any case law, statute or rule of arbitration which establishes that payment of an arbitration fee conclusively precludes assertion of a defense based on jurisdiction. Instead, it cites a number of a cases which stand for the unremarkable proposition that the defense of personal jurisdiction "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct." *Neirbo Co. v. Bethlehem Ship Building Corp.*, 308 U.S. 165, 168 (1939). *See also, Cactus Pipe & Supply Co., Inc. v. M/V Montmartre*, 756 F.2d 1103, 1110-1111 (5th Cir. 1985) (filing of claim by owner of vessel in foreign dispute subjects owner and vessel to jurisdiction); *Sunbank of Ocala v. Pelican Homestead & Savings Assoc.*, 874 F.2d 274, 276 (5th Cir. 1989) (filing of a motion to dismiss constitutes an appearance and attempt to contest suit) and *Broadcast Music, Inc v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) (entry of appearance and participation in litigation by corporate attorney on behalf of shareholders constitutes consent to jurisdiction).

These cases speak, specifically, to consent and waiver of jurisdiction as referenced in F.R.C.P. 12(h), a rule which, by its terms, applies in proceedings pending before federal courts. By its own terms, F.R.C.P. 12(h) has no application to an arbitration proceeding, nor do the cited cases address waiver in an arbitration context. Simply put, there is no case cited by Lakeside which imposes the legal effect it demands.

2. Lakeside did not preserve its arguments regarding waiver and ratification on appeal

Lakeside's assertion of waiver and acceptance based on Chester's payment is being made for the first time in its Petition for Writ of Certiorari before this Court. Lakeside had multiple opportunities to raise and argue this point before both the Windsor Superior Court and the Vermont Supreme Court and failed on each of those occasions to do so. APP 1-58; Chester APP 4-22. While it is uncontested that Chester's payment to the arbitrator was part of the record at the trial, it was never presented as having the legal effect now advanced by Lakeside. Chester APP at 4-22. There is no reference in any of Lakeside's briefs filed before the Vermont Supreme Court that Chester's payment, in fact, constituted an "acceptance" of jurisdiction or constituted a waiver of any of Chester's rights to assert personal jurisdiction as a defense. Chester APP 4-22. In fact, the only waiver argument raised on appeal, and addressed by the Vermont Supreme Court in *Lakeside I*, was specifically related to Chester's failure to raise the jurisdictional issues in the Illinois proceedings. *Lakeside I*, 173 Vt. at 321-322, 795 A.2d at 1178-1179; APP 25-26; Chester APP 7-13.

"A claim will not be considered where it is raised for the first time on certiorari review and state courts have had no opportunity to pass on it." *Monks v. New Jersey*, 398 U.S. 71, 71, 90 S. Ct. 1563, 26 L.Ed.2d 54 (1970). The Vermont Supreme Court requires litigants to raise and preserve their issues on appeal. *See In re Johnston*, 145 Vt. 318, 321, 488 A.2d 750 (1985) ("Issues not raised below will not ordinarily be considered when presented for the first time on appeal."). Lakeside's failure to present what it now sees as a critical issue warranting certiorari review to the Vermont Supreme Court in conformance with state procedures is, in and of itself, grounds for denying review by this Court. *Michigan v. Tyler*, 436 U.S. 499, 512, n. 7, 98 S.Ct. 1942, 1951, 56 L.Ed.2d 486 (1978). Accordingly, Lakeside's effort to address the "waiver" and "acceptance" for the first time on certiorari review is procedurally defective.

CONCLUSION

There being no compelling reason demonstrated by Petitioner Lakeside to grant certiorari review of this case, Chester respectfully requests that this Court deny Lakeside's Petition for Writ of Certiorari.

Respectfully submitted this 25th day of April, 2005.

ENGLISH, CARROLL & RITTER, P.C.
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64 Court Street
Middlebury, VT 05753
(802) 388-6711
(802) 388-2111 (facsimile)

App. 1

TOWN CHESTER

Depot Street
P.O. Box 370
Chester, VT 05143

(802) 875-2173
Fax (802) 875-2237

August 1, 1996

Mr. Walter McBride, III
Lakeside Equipment Corporation
P.O. Box 8448
Bartlett, IL 60103

Dear Mr. McBride:

The Select Board reviewed your invoice of $40,092.00 for clarifier parts at their meeting last night and are withholding approval for payment.

David Duquette had no authority to negotiate such a purchase. Town policies do not permit purchases in excess of $500.00 without a purchase order. Secondly, with purchases of this magnitude, it is our policy to solicit bids or quotes from at least three firms.

We have employed an engineer to review the purchase to determine (a) whether we needed these parts and (b) whether the price is competitive. Depending on his evaluation, we may or may not be returning the materials to you. The review will take place during the following week with a report delivered by August 14.

Sincerely,

Susan S. Spaulding
Town Manager

SSS:gae

App. 2

TOWN OF CHESTER

Depot Street
P.O. Box 370
Chester, VT 05143

(802)875-2173
Fax (802) 875-2237

August 27, 1996

Mr. Walter McBride, III
Lakeside Equipment Corporation
P.O. Box 8448
Bartlett, IL 60103

Dear Mr. McBride:

At their meeting of August 21, 1996, the Selectboard reviewed their engineer's report regarding the clarifier parts you delivered to us. It was their decision not to purchase these materials and, therefore, they will be returned to you as soon as possible.

Sincerely,

Susan S. Spaulding
Town Manager

SSS:gae

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION RULES
As Amended and Effective on July 1, 1996

COMMERCIAL ARBITRATION RULES

50. **Neutral Arbitrator's Compensation**

Unless the parties agree otherwise, members of the National Panel of Commercial Arbitrators appointed as neutrals on cases administered under the Expedited Procedures with claims not exceeding $10,000, will customarily serve without compensation for the first day of service. Thereafter, arbitrators shall receive compensation as set forth herein.

Arbitrators shall charge a rate consistent with the arbitrator's stated rate of compensation, beginning with the first day of hearing in all cases with claims exceeding $10,000.

If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the Association and confirmed to the parties.

Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

51. **Deposits**

The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.

App. 4

IN THE SUPREME COURT OF THE STATE OF VERMONT

LAKESIDE EQUIPMENT CORP.

VS.

TOWN OF CHESTER

SUPREME COURT DOCKET NO. 2000-575

Lakeside Equipment Corp., Appellee

On Appeal From The
Windsor Superior Court
Docket No. S153-4-98Wrcv

APPELLEE'S BRIEF

Lakeside Equipment Corp.
By Its Attorney:
Patrick M. Ankuda, Esq.
Parker & Ankuda, P.C.
P.O. Box 519
Springfield, VT 05156
(802) 885-2582

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE LOWER COURT CORRECTLY DECIDED THAT THE TOWN IS PRECLUDED FROM RAISING THE ISSUE OF AGENCY AUTHORITY WHERE THE TOWN FAILED TO RAISE THAT ISSUE IN A TIMELY MANNER UNDER THE ARBITRATION ACT?

II. WHETHER THE LOWER COURT CORRECTLY FOUND THAT ILLINOIS HAD PERSONAL JURISDICTION OVER THE TOWN?

III. WHETHER THE COURT PROPERLY GRANTED LAKESIDE'S SECOND MOTION FOR SUMMARY JUDGMENT?

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B. The Town Is Precluded From Raising The Issue Of Agency Authority By Its Failure To Raise That Issue In A Timely And Proper Manner Under The Uniform Arbitration Act.

In its Counterclaim below and now in its Appeal before this Court, the Town collaterally attacks the Illinois Judgment claiming alleged lack of agent authority in the formation of the parties' Contract. In the first two parts of its argument on brief, the Town variously asserts, mostly without legal support, that its agent, David Duquette,

acting outside the scope of his authority when filing an Order with Lakeside. Appellant's Brief at 7-11. On that basis, the Town requests a ruling that no valid Contract ever existed between Lakeside and the Town and consequently, the Town need not pay for the equipment. *Id.*; P.C. at 115.

Thus, the Town attacks not only the Illinois Judgment but the Contract and Arbitration Award upon which that Judgment is based. Under the Uniform Arbitration Act as adopted in both Illinois and Vermont, the Town had to object to the validity of the Contract, challenge arbitrability and contest the Award in a pre-Arbitration action or in the Arbitration itself, or in the Illinois Court. In order to attack the Illinois Judgment on the basis of lack of agency authority, the Town needed to Appeal the Illinois Judgment in Illinois. A collateral attack upon that Judgment now is inappropriate. *See* 47 Am.Jur.2d *Judgments* Section 916. The Town made no challenge then and cannot do so now. In its Decision, the Lower Court so held and properly limited the Town's collateral attack to due process. P.C. at 19.

1. The Town Failed To Raise Its Purported Defenses In The Illinois Courts Under The Arbitration Act.

Like Vermont, Illinois has adopted the Uniform Arbitration Act. *See* 710 ILCS Act 5. Section 11 of the Act provides that "upon application of a party, the court shall confirm the [arbitration] award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award in which case the court shall proceed as provided in Section 12 and 13." 710 ILCS 5/11. That Statute clearly provides that the Court

should confirm the award unless a party responds to the award by asserting grounds to vacate, modify or correct it. *See Konicki v. Oak Brook Racquet Club, Inc.*, 441 N.E.2d 1333, 1335 (Ill.App.Ct. 1982).

Under Illinois law, the burden is on the party opposing confirmation to come forward and timely apply to vacate, modify or correct the award. 710 ILCS Sections 5/12, 5/13. Grounds to challenge an award are set forth in Section 12 and 13 of the Act. *See id.* The Act requires, however, that the party opposing the award apply to vacate, modify or correct the award within 90 days after delivery of a copy of the award, except in cases of corruption, fraud or "undue means." 710 ILCS 5/12(b), 5/13(a). The filing of a petition to confirm an award does not extend that 90-day period. *Konicki*, 441 N.E.2d at 1335-1336. Thus, under Illinois law, a party seeking review of an arbitration award must either file a petition in the Circuit Court within 90 days of the award pursuant to Sections 12 and 13 of the Uniform Arbitration Act, or raise the grounds upon which review is sought in answer to the other party's petition to confirm the award under Section 11 of the Uniform Arbitration Act. *See id.* at 1335. That position is also consistent with Vermont law.

Like Illinois, Vermont enacted the Vermont Arbitration Act (VAA) based upon the Uniform Arbitration Act. *See* 12 V.S.A. Section 5651-5681. Consistent with Section 11 of the Illinois Act, under the VAA, a Vermont court shall confirm an arbitration award unless it finds grounds to vacate or modify it. 12 V.S.A. Section 5676. The VAA sets out those grounds, thereby limiting judicial discretion. The VAA requires the party opposing confirmation to come forward and apply to vacate, modify or correct an award within 30 days after delivery of a copy of the award, except

also in cases of corruption, fraud or "undue means." 12 V.S.A. Sections 5677(c), 5678(a). The Vermont Supreme Court adopts a "policy to uphold arbitration whenever possible and to prevent arbitration being another layer in the litigation process." *Springfield Teachers Association v. Springfield School Directors*, 167 Vt. 180, 187 (1997). To that end, the trial court becomes "'an appellate tribunal with a limited scope of review.'" *Matzen Construction Company v. Leander Anderson Corp.*, 152 Vt. 174, 177 (1989) (quoting *Wayne Insulation Company v. Hex Corp.*, 534 A.2d 1279, 1281 (D.C. 1987)).

In *Springfield Teachers Association*, *supra*, the Vermont Supreme Court affirmed a lower court decision confirming an arbitration award. *Springfield Teachers*, 167 Vt. at 190. In that case, the parties arbitrated an employee grievance; the plaintiff obtained an award to be reinstated at his job with back pay. *Id.* at 182-183. When plaintiff moved to confirm the award under VAA Section 5676, the defendant, Board, raised affirmative defenses including lack of jurisdiction. *Id.* at 183-187. The Court concluded that such defenses were "more properly characterized as grounds for vacating the arbitration award." *Id.* at 187. The Court found that the defendant, Board, failed to move to vacate the award within 30 days after delivery in accordance with VAA Section 5677(c). *Id.* Accordingly, the Court held that a party cannot raise affirmative defenses to an application to confirm an arbitration award unless it does so within the 30 day time limit provided in Section 5677. *Id.* Furthermore, the Court concluded that the VAA does not except jurisdictional defenses from the time limit established in that statute. *Id.* at 190.

This Court's position is consistent with Illinois case law. Indeed, in that case, the Court looked to Illinois case

law to interpret Section 5677. *See id.* at 188 (citing *Mid-America Regional Bargaining Association v. Modern Builders Industrial Concrete Company*, 427 N.E.2d 1011 (Ill.App.Ct. 1981)). *See also Joder Building Corp. v. Lewis*, 153 Vt. 115, 121 (1989).

In this proceeding to domesticate the Illinois Judgment confirming the Arbitration Award, the Town, through its Counterclaim, seeks to vacate the Arbitration Award. Like the Defendant, Board, in *Springfield Teachers Association*, the Town, is too late. The Town is two steps removed from its proper venue – the Arbitration proceeding – and untimely under Illinois' Uniform Arbitration Act. 710 ILCS 5/12. In fact, the AAA served the Arbitration Award upon the Town, on August 27, 1997. The Town did nothing. It failed to file a Motion To Vacate in Illinois within 90 days thereafter. The Town did not file a Motion in Vermont within 30 days thereafter. Interestingly enough, the Town alleged no procedural defects regarding the conduct of the Arbitration. Thus, it cannot now seek to do so.

The Defendant, Town's claim is just the type of case decried by this Court.

> "[O]ur policy is to uphold arbitration awards whenever possible and to prevent arbitration becoming another layer in the litigation process. The short period allowed by statute for challenging an award implements this purpose. We would undermine the statutory purpose, and the effectiveness of arbitration, if we held that a party who lost before the arbitrator could raise defenses at anytime in response to a motion to confirm. Indeed, the incentive would be to refuse to

> comply with the arbitration award and to raise defenses as late as possible."

Springfield Teachers Association, 167 Vt. at 187-88 (citations omitted).

2. The Town Waived The Agency Authority Defense By Failing To Raise It In the Arbitration.

In the context of Arbitration under the Uniform Arbitration Act, Vermont adopts a "waiver rule." A party must raise objections to arbitration and arbitrability of a claim in the Arbitration itself or waive any such defects. *See Joder Building Corp. v. Lewis*, 153 Vt. 115, 119-121 (1989). That party must raise "objections to arbitration jurisdiction . . . at the earliest possible moment to allow that issue to be addressed and resolved before the parties spend significant time and resources trying the case." *Id.* at 121.

The waiver rule serves the policy of arbitration as "an alternative dispute mechanism." *Id.* at 120. The rule requires a party "to contest the presence of a valid arbitration agreement early in the proceedings." *Id.* at 121.

In *Joder*, the Court affirmed a Vermont Judgment confirming an Arbitration Award despite claims by the Appellant in that case that the Arbitration was defective because no valid agreement existed. *Id.* at 123. Appellants there entered into an Arbitration Agreement that was statutorily invalid under the VAA. *Id.* at 118-119. When the Arbitrators would not grant a postponement of the Arbitration, the Appellants refused to attend. *Id.* at 117. The Arbitration went forward without the Appellants and an Award was entered. *Id.* at 117-118. When Plaintiff moved to confirm the Award in Superior Court, the Appellants

raised the validity issue for the firs [sic] time. *Id.* at 118. This Court rejected their claim on Appeal, holding that they participated sufficiently to justify a waiver. *Id.* at 122. The Court stated the refusal to appear at the Hearing was not an objection to Arbitration. *Id.* at 120.

Indeed, as the Court pointed out, citing Illinois case law, the Uniform Arbitration Act provides pre-arbitration procedures to address the issues of validity of an arbitration agreement and arbitrability of a claim. *Id.* at 121. Section 5674 of the VAA provides that an application to stay arbitration and on a showing that there is no agreement to arbitrate, the Court may stay a commenced or threatened arbitration proceeding. 12 V.S.A. Section 5674(b). If the Court finds no enforceable agreement to arbitrate, it shall order a stay. *Id.*

In the present case, there is no dispute of material fact regarding the Arbitration. The Town received notice of the Demand For Arbitration. *Id.* By letter dated December 18, 1996, the AAA noted the requested Hearing locale in Chicago and the Appointment of the Arbitrator, with a request for any objections. *Id.* The Town did not respond to that letter from the AAA. *Id.* The Town raised no defenses to the Arbitration in the Arbitration proceeding or in a pre-Arbitration proceeding. Despite notice and opportunity, it refused to attend the Arbitration. P.C. at 7. Furthermore, it participated to the extent of complying and paying its share of the costs of the Award. P.C. at 7. The Lower Court correctly concluded that the Town could not raise its defenses.

Despite its lack of compliance with the Arbitration Act, the Town tries to use other facts recited by the Court regarding its defenses to overcome its problem here.

Appellant's Brief at 7-8. The Town's argument only proves the point of *Joder*. The Town produced no evidence or objections until Lakeside sought to domesticate its Judgment her [sic] in Vermont. The Town ignored the Arbitration Act altogether, just as it ignored the UCC throughout the proceeding. As this Court pointed out in *Joder*, such conduct should not be rewarded. *Joder*, *supra* at 121-122. The Town only drove up the costs of this case, a result that the waiver rule seeks to prevent. This Court should not countenance such action, but instead affirm the Lower Court.

Moreover, the Town's collateral attack is not a proper one. The Town never appealed the Illinois Judgment. P.C. at 58. It cannot attack the merits of that Judgment here. *See* 47 Am.Jur.2d *Judgments* Sections 916, 928. This Court should so hold.

C. The Lower Court Correctly Held That Illinois Had Personal Jurisdiction Over the Town.

In its Brief, the Town repeats its collateral attack on the Illinois Judgment claiming lack of personal jurisdiction over it. Appellant's Brief at 12. Judgments of sister States are presumptively valid and entitled to "full faith and credit." *Hall v. McCormick*, 154 Vt. 592, 595 (1990); *Lueders v. Lueders*, 152 Vt. 171, 172 (1989). The Town bears the burden to overcome that presumption. *Driver v. Driver*, 148 Vt. 560, 562 FN.* 1987. The Town failed to meet that burden below and it fails to meet that burden here.

1. The Town Had Sufficient Minimum Contacts With Illinois That Relate To The Subject Of This Litigation To Entitle Illinois To A Certain Jurisdiction Over The Town.

The Town's principal attack on the Illinois Judgment is lack of personal jurisdiction. Yet, the Town offered little to the Lower Court to dispute assertion of jurisdiction over it. In its Brief here, it offers even less, relying principally on one distinguishable case and without reference to the Lower Court's extensive factual record. The Lower Court reviewed the facts material to the issue of personal jurisdiction and correctly decided that the Town had sufficient minimum contacts with Illinois to entitle Illinois to assert jurisdiction over the Town. P.C. at 16-19. This Court should affirm that Decision.

The Town's argument rests on the application of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The Due Process Clause protects parties from being subject to Judgments of a State with which they have "no meaningful contacts." *Dall v. Kaylor*, 163 Vt. 274, 275 (1995). A State Court may assert jurisdiction over a non-resident Defendant and satisfy due process when that Defendant has "'certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."'" *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

"Minimum contacts" have become the touchstone finding in jurisdictional analysis under the Due Process Clause. Since the time of *International Shoe*, the United States Supreme Court and this Court have refined that analysis to one critical question: "whether 'the defendant's conduct in connection with the forum state are such that

[the defendant] should reasonably anticipate being haled into Court there.'" *Id.* at 276 (quoting *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). The test of reasonableness is satisfied "when the Defendant purposefully directs activities toward residents of a forum state and the litigation arises out of, or relates to that activity." *Id.* The reasonableness test protects a Defendant from being haled into Court in a forum State based on "fortuitous, attenuated or random contacts." *Id.*

In the present case, the facts found by the Court for purposes of analysis were not contested. Those facts clearly established minimum contacts between the Town and Illinois. On or about April 15, 1996, Mr. Duquette, the Plant Operator of the Town's waste water facility contacted Lakeside in Illinois and placed a verbal order. P.C. at 4, 16. Lakeside acknowledged Mr. Duquette's Order in writing, itemizing the costs of the equipment ordered and including a form stating the Conditions of Sale. P.C. at 4, 16. The Town, through Mr. Duquette, supplied Lakeside with the Town's Purchase Order. P.C. at 4, 16. Lakeside designed the equipment, had it specially manufactured and shipped it to the Town on June 24, 1996. P.C. at 5,16. The Town acting again through Mr. Duquette received and accepted the equipment on June 27, 1996. P.C. at 5, 16. When the Town did not pay, Lakeside's Comptroller telephoned the Town of Chester to find out when payment would be sent and spoke with Chester Town Manager, Susan Spaulding. P.C. at 6, 16. Ms. Spaulding told Ms. Wolk that the check for payment of the Invoice would go out on July 31, 1996 which was one week later than the telephone call. P.C. at 6, 16. The Town paid nothing, but rather more than thirty days later, sent a notice to Lakeside saying that it refused to purchase the equipment

specifically manufactured for and delivered to it. P.C. at 6, 16-17.

The undisputed facts show that the Town intentionally initiated contact with Lakeside in Illinois by calling for a quote and then ordering the equipment. Out of those facts, this case arose. P.C. at 18.

The case relied upon by the Town, *Carothers v. Vogeler*, 148 Vt. 316 (1987), is distinguishable. In that case, a Vermont Defendant advertised a restored car once in a nationally circulated publication and sold it to the Ohio Plaintiff. *Id.* at 317. The seller was not in the business to sell cars. *Id.* More importantly for this analysis here, the Vermont Defendant appeared and presented his defense of lack of personal jurisdiction in Ohio to preserve that defense. *Id.* at 318. Here, the Town did nothing.

The Town was in the waste water treatment business. Unlike the Vermont Defendant in *Carothers*, the Town called Lakeside to place an Order; the Town purposefully directed its commercial activities at Illinois and Lakeside. Its reliance on *Carothers* is misplaced. The Lower Court correctly decided the matter. This Court should so hold.

2. The Town Is Precluded By The Waiver Rule From Raising The Issue Of Personal Jurisdiction

As discussed above, the Waiver Rule bars jurisdictional challenges not raised in arbitration first. *See* Section B.2. above. The facts are not in dispute. The Town did not raise the issue in Arbitration and preserve its claim. P.C. at 8. Compare *Carothers v. Vogeler*, 148 Vt. 316, 318 (1987) (Vermont Defendant appeared in Ohio litigation and raised jurisdictional defense to preserve it). Therefore,

the Town waived its right to do so later in litigation. Furthermore, under Illinois' Rules of Civil Procedure, a party may object to the Court's jurisdiction over the parties' person by filing a Motion to Dismiss the entire proceeding or any cause of action involved in the proceeding. 735 ILCS 5/2-301(a). The Town did nothing to preserve its jurisdictional defense in the Illinois Courts. *See Carothers, supra.*

3. The Defendant Town Consented To Jurisdiction In Illinois Because the Contract Contained An Arbitration Provision With Clauses For Choice Of Law And Jurisdiction That The Defendant, Town, Failed to Object To In A Timely Manner.

The Lower Court found that the parties entered into a contract under the UCC, a point ignored by the Town. P.C. at 18-19. The parties' contract, as contained in McBride's April 23, 1996 letter included an arbitration provision:

> "*ARBITRATION*: Any controversy or claim arising out of or relating to this contract or any modification thereof, shall be settled in Kane County, Illinois, by Arbitration in accordance with the laws of the State of Illinois, and the current Rules of the American Arbitration Association, and the parties consent to jurisdiction of the Circuit Court of the 16th Judicial Circuit, Kane County, State of Illinois, and further consent that any process or notice of motion or other application to such Court or Judge thereof may be served outside the State of Illinois by Registered Mail or by personal service, provided a reasonable time for appearance is allowed. Judgment upon the Award rendered by the Arbitrator may be entered in any Court having jurisdiction

> hereof, which shall include the County of arbitration."

P.C. at 6-7. That provision contained a forum selection clause that established personal jurisdiction and service for the Defendant, Town. *See id.* The parties waived personal jurisdiction defenses. The Defendant, Town, did not reject that term in a timely manner under the UCC. Therefore, the arbitration provision governs. UCC Section 2-201 *Off'l Comment* #2.

Personal jurisdiction is waivable; and the parties can easily contract to waive it. *RAR Inc. v. Turner Diesel Ltd.*, 107 F.3d 1272, 1280 (7th Cir. 1997). A forum selection provision like the one at issue in this case is "prima facie valid." *Richardson Engineering Company v. IBM*, 554 F.Supp. 467, 469 (D.Vt. 1981) (J. Coffrin). "It is now generally accepted that a choice of forum agreement of contracting parties controls absent a strong showing that it should be set aside." *Id.* at 468. A forum selection clause in a "freely negotiated" contract may be enforced without offending due process. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n. 14 (1985).

In the present case, the Town by failing to object to the terms of the contract in a timely manner pursuant to the UCC consented to personal jurisdiction in Illinois. Jurisdiction of the arbitration in Illinois was proper. The Town has no defense on that basis.

4. The Town Is Barred By Res Judicata From Raising The Issue Of Personal Jurisdiction When The Arbitration Addressed The Issue And The Town Did Not Timely Object.

As the undisputed facts clearly show in this case, the Arbitrator considered the issue of personal jurisdiction over the Town before rendering an award. P.C. at 8. In fact, the Arbitrator afforded the Town the opportunity to file its own brief regarding jurisdiction, but the Town chose to do nothing. *Id.* Based upon the parties' contract and its provisions, the Arbitrator entered his decision in favor of Lakeside. The issue of personal jurisdiction cannot be relitigated here. *See Springfield Teachers Association v. Springfield School Directors*, 167 Vt. 180, 190 (1997).

The judicial doctrine of *res judicata* bars relitigation of claims that were or might have been litigated in a previous action between the parties. *Agway, Inc. v. Gray*, 167 Vt. 313, 316 (1997). A final judgment bars a subsequent action where the parties and causes of action are identical. *Monmouth Public Schools, District No. 38 v. Pullen*, 489, N.E.2d 1100, 1106 (Ill.App.3d Dist. 1985). An arbitration award has the same preclusive force and effect as a Court Judgment. *Gray*, 167 Vt. at 316-17; *Pullen*, 489 N.E.2d at 1106. The Lower Court has also recognized that the *res judicata* effects from an arbitration proceeding are strong. P.C. at 59.

In *Springfield Teachers Association*, the Vermont Supreme Court held that a party may not raise affirmative defenses to an application to confirm an arbitration award unless it does so within the time limit for moving to vacate an arbitration award under the State's Arbitration Act. *Springfield Teachers Association*, 167 Vt. at 189. In that case, the Defendant, Springfield School Directors, challenged an

arbitration award more than 30 days after a motion to vacate the award would have been due. *See* 12 V.S.A. Section 5677(c). Once [sic] of the grounds on appeal was the lack of subject matter jurisdiction of the arbitrator. *Springfield Teachers Association*, 167 Vt. at 187, 189-190. The Vermont Supreme Court ultimately concluded that Section 5677 of the Vermont Arbitration Act requires that all jurisdictional challenges be raised within the statutory time limit for a motion to vacate. *Id.* at 190. As the Court made clear, "The usefulness of arbitration is undermined if issues can be withheld from the arbitrator and raised for the first time in court long after the arbitration is over." *Id.*

The Supreme Court's conclusion in *Springfield Teachers Association* has more force in this case. The *Springfield Teachers Association* case concerned a subject matter jurisdiction challenge. Subject matter jurisdiction is the one defense under the Rules of Civil Procedure that is usually not waived by the parties. *See* V.R.C.P. [sic] 12. Personal jurisdiction on the other hand, is waivable. *See RAR, Inc., supra*. In this case, the Town, by failing to object to the terms of the contract, waived personal jurisdiction. It also failed to timely raise the issue in a motion to vacate the award either in Illinois or in Vermont under the Uniform Arbitration Act. If subject matter jurisdiction can be waived by failure to follow the rules of the Uniform Arbitration Act then certainly personal jurisdiction, a clearly waivable defense, should also be waived. The *Springfield Teachers Association* holding should apply in this case and Judgment affirmed for Lakeside.

IN THE SUPREME COURT OF THE STATE OF VERMONT

LAKESIDE EQUIPMENT CORP.

VS.

TOWN OF CHESTER

SUPREME COURT DOCKET NO. 2003-193

Lakeside Equipment Corp., Appellant

On Appeal From The
Windsor Superior Court
Docket No. S153-4-98Wrcv

APPELLANT'S BRIEF

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* * *

Section D. Claims of Error

I. THE LOWER COURT ERRED BY FAILING TO FIND THAT THE TOWN'S AGENT, DAVID DUQUETTE, HAD ACTUAL AUTHORITY TO ENTER INTO THE CONTRACT ON THE TOWN OF CHESTER'S BEHALF.

II. THE LOWER COURT ERRED BY FAILING TO FIND DUQUETTE HAD APPARENT AUTHORITY

TO ACT ON BEHALF OF THE TOWN IN PLACING AN ORDER WITH LAKESIDE EQUIPMENT.

III. THE LOWER COURT ERRED BY FAILING TO FIND THAT THE TOWN SHOULD BE ESTOPPED FROM DENYING DUQUETTE'S AUTHORITY IN THIS TRANSACTION.

IV. THE LOWER COURT ERRED BY FAILING TO TAKE INTO CONSIDERATION THAT UNDER THE UNIFORM COMMERCIAL CODE A VALID CONTRACT MAY BE FORMED BETWEEN MERCHANTS WITHOUT THE FORMAL REQUIREMENTS OF A CONTRACT.

* * *